14-1375

Supreme Court, U.S.
FILED
MAY 19 2015
OFFICE OF THE CLERK

No. 14-____

IN THE
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 19, 2015

QUESTION PRESENTED

Whether a dismissal of a Title VII case, based on the Equal Employment Opportunity Commission's total failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, can form the basis of a attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k)?

PARTIES TO THIS PROCEEDING

The only two parties to this proceeding are identified in the case caption on the cover.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner CRST Van Expedited, Inc. is the wholly owned subsidiary of its parent corporation, CRST International, Inc., which is a privately held corporation. No publicly held corporation owns any of CRST Van Expedited, Inc.'s or CRST International, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner CRST Van Expedited, Inc. ("CRST") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 774 F.3d 1169 (8th Cir. 2015). Pet. App. 1a. The opinion of the United States District Court for the Northern District of Iowa is unreported but is available at 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013). Pet. App. 33a. The Eighth Circuit's opinion issued on EEOC's first appeal in this case that decided liability issues is reported at 679 F.3d 657 (8th Cir. 2012). Pet. App. 86a. The original district court dismissal decision is unreported but is available at 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa Aug. 13, 2009). Pet. App. 164a.

JURISDICTION

The Eighth Circuit denied petitioner's timely petition for rehearing *en banc* on February 20, 2015. Pet. App. 218a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee

(including expert fees) as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person.

Section 706 of Title VII, 42 U.S.C. § 2000e-5, provides in pertinent part that:

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the

Commission is authorized to take action with respect to the charge.

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(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

STATEMENT

CRST seeks review of the Eighth Circuit's reversal of the award of fees and costs it won after prevailing in a massive sexual harassment case brought by the Equal Employment Opportunity Commission ("EEOC") under Title VII. The EEOC alleged that many female drivers employed by CRST, a long-haul trucking firm, had experienced sexual harassment on the job and that the company had violated Title VII by tolerating this behavior. The Commission sought class-wide injunctive relief and punitive damages and also compensatory damages for individual female drivers. The district court granted summary judgment for CRST, in part because the EEOC had failed to engage in any form of pre-suit investigation, reasonable cause determination, or conciliation extending beyond the claims of just two alleged victims. The Eighth Circuit affirmed the grant of summary judgment, agreeing that

the Commission had "wholly failed" to satisfy its pre-suit obligations. Pet. App. 115a-116a.

Notwithstanding that conclusion, when the district court awarded fees and costs to CRST as a prevailing defendant as to the claims dismissed for EEOC's failure to satisfy Title VII's pre-suit requirements, the Eighth Circuit reversed. It did so not because it disagreed about the unreasonableness of the EEOC's conduct but because the Eighth Circuit applies a rule limiting civil rights fee awards to cases involving rulings "on the merits." That decision calls out for review primarily because it flatly conflicts with decisions from three other circuits that have affirmed awards of fees to defendants who had prevailed based on the EEOC's failure to satisfy its pre-suit obligations. That conflict reflects a broader disagreement among the circuits about whether and when fees may be awarded to defendants in civil rights cases terminated prior to a ruling on the merits. In addition, the decision is difficult to square with this Court's decisions in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Finally, the Eighth Circuit's ruling makes no sense as a matter of statutory policy.

1. On September 27, 2007, the EEOC filed a complaint on behalf of Monika Starke, a CRST driver, and a class of "similarly situated" but unidentified CRST female employees. Pet. App. 34a. EEOC sought injunctive relief and compensatory and punitive damages for Ms. Starke and other unidentified CRST female employees who had allegedly been sexually harassed while employed by CRST as long-distance

truck drivers or trainees. *Id.* at 36a. After filing its complaint, the EEOC sought to establish that CRST had engaged in a pattern or practice of tolerating such harassment.

During pretrial discovery, the EEOC began identifying the individuals on whose behalf it was asserting individual claims of sexual harassment. Because CRST was confronted with an ever-growing number of individual claims to defend against as the close of discovery and the trial date approached, it sought relief from the district court, and the court imposed a deadline for the EEOC's identification of its individual claims. As the deadline approached, the EEOC began identifying large numbers of claims and ultimately named 270 women whom it alleged had been sexually harassed by male CRST drivers. Pet. App. 38a.

CRST moved for an order to show cause why these hastily identified claims should not be dismissed on the ground that the EEOC had identified so many claims in such a short period of time that it clearly had not adequately determined that the claims were valid. In response, the EEOC represented to the district court that it had sufficient grounds for all 270 claims. The district court accepted that representation, but warned the EEOC that if it turned out that its claims were not reasonably grounded, CRST could seek compensation. Pet. App. 39a.

As the extensive discovery came to a close — CRST ultimately deposed 154 of the EEOC's individual claimants — it became clear that EEOC did not have valid grounds for the vast majority of its claims. For a

start, 99 of the EEOC's 270 individual claims were dismissed by the district court as a discovery sanction, which the EEOC did not appeal, because the claimants did not even appear for their depositions. Pet. App. 40a. The EEOC unilaterally dropped 18 other claims.

The district court next granted summary judgment to CRST on the pattern or practice issue.[1] The district court concluded, on undisputed facts, that CRST's written anti-harassment policy and its enforcement of that policy satisfied Title VII's requirements. In addition, the district court found that the incidence of allegations of sexual harassment at CRST was too low to suggest any wrongful pattern or practice. EEOC did not appeal these summary judgment rulings.

The district court also granted summary judgment to CRST on 87 of the EEOC's remaining 154 individual claims. The grounds for these rulings, which varied from claim to claim, included that the alleged harassment was not severe or pervasive, that the female drivers had not complained of harassment while on the alleged harassers' trucks, that CRST had adequately responded when it received timely harassment complaints by promptly removing the female drivers from the alleged harassers' trucks, and that some claims were untimely.[2]

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[1] *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918 (N.D. Iowa 2009).

[2] The district court's summary judgment rulings on individual claims are available at *EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867 (N.D. Iowa 2009) (statute of limitations); *EEOC v. CRST Van Expedited, Inc.*, 614 F. Supp. 2d 968 (N.D. Iowa 2009)

2. Once the district court held that EEOC did not have even a prima facie case that CRST had engaged in a pattern or practice of tolerating sexual harassment of its female drivers, it was clear that, except for its claims on behalf of Monika Starke and Remcey Peeples,[3] the EEOC had not fulfilled its statutory requirement to investigate the individual claims, find reasonable cause for those claims, and then attempt to conciliate them before bringing suit. Because CRST does not operate a large common workplace, such as a factory, each of the other 152 individual claims was based on different and unique facts — different female drivers, alleged harassers, trucks, locations, and nature of the alleged harassment — that had not been investigated by the EEOC before filing this suit. Therefore, CRST filed a motion to dismiss the remaining 67 individual claims, which the district court

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(judicial estoppel); *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 46204 (N.D. Iowa June 2, 2009) (intervenors' claims); *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 52089 (N.D. Iowa June 18, 2009) (failure to report or effective CRST response to reported harassment); *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, Order (N.D. Iowa July 6, 2009), ECF No. 256 (alleged harassment not severe or pervasive); *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 64118 (N.D. Iowa July 9, 2009) (two or more grounds).

[3] Ms. Peeples had filed a charge with the EEOC which investigated it, found reasonable cause, and attempted to conciliate it. The EEOC then included her claim in its lawsuit. Ms. Peeples subsequently asserted her own claim as an intervenor, but the district court granted summary judgment to CRST and the Eighth Circuit affirmed. Pet. App. 152a-154a. CRST has not sought to recover its fees with respect to the EEOC's claims on behalf of Ms. Peeples or Ms. Starke.

granted after holding an evidentiary hearing. Pet. App. 202a-215a.

In response to CRST's motion to dismiss, the EEOC conceded that it had not separately investigated, found reasonable cause, or attempted to conciliate any of its individual claims other than those on behalf of Ms. Starke and Ms. Peeples. However, the EEOC argued that, because it satisfied the Title VII pre-suit requirements for at least one sexual harassment claim, here the Starke claim, it was not required to do so for other female drivers' sexual harassment claims against the same employer. The district court rejected that argument:

> The EEOC cites no binding legal authority that allows it to do what it is attempting to do in this case, *i.e.*, bootstrap the investigation, determination and conciliation of the allegations of Starke and a handful of other allegedly aggrieved persons into a § 706 lawsuit with hundreds of allegedly aggrieved persons. The mere fact that Starke and a handful of other women allege they were sexually harassed while working for CRST provides no basis for the EEOC to litigate the allegations of 67 other women in this lawsuit.

Pet. App. 206a.

Based on the record, the district court found that the

> "EEOC did not conduct any investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint — let alone issue a reasonable cause determination as to those allegations or conciliate them. The record shows that the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case."

Pet. App. 204a.

Finding that CRST's request for an award of its fees and costs met the *Christiansburg* standard for fees awards to defendants ("frivolous, unreasonable, or without foundation"), the district court awarded CRST $4,004,371.65 in attorney's fees and $463,071.25 in expenses in addition to taxable costs.[4]

3. The EEOC appealed the dismissal of the 67 claims for failure to satisfy Title VII's pre-suit requirements, as well as 40 of the district court's summary judgment rulings and the award of fees and costs. The Eighth Circuit affirmed as to all but two of the claims that EEOC included in its appeal. It affirmed as to 38 of the 40 claims on which summary judgment had been granted. Pet. App. 114a. It also affirmed the dismissal of the 67 claims that had been

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[4] The district court's first decision awarding fees and costs to CRST is available at *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010).

dismissed, agreeing that EEOC had "wholly failed" to satisfy Title VII's pre-suit requirements. Pet. App. 115a-116a. Because two claims were remanded to the district court and there was thus no final judgment in place, the Eighth Circuit vacated the district court's award of fees and costs to CRST without prejudice. Pet. App. 156a.

On remand, after entry of another final judgment, CRST renewed its petition for an award of attorney's fees and costs. The district court again found that the EEOC's pursuit of its claims was unreasonable under *Christiansburg* and awarded CRST $4,189,296.10 in attorney's fees, $413,387.58 in out-of-pocket expenses, and taxable costs of $91,758.46. Pet. App. 84a-85a.

4. On its second appeal, the EEOC did not contest the calculation of the fee award, but contended instead that, because of a settlement reached regarding Monica Starke, the EEOC was the prevailing party, not CRST. The EEOC argued alternatively that, if CRST was held to be the prevailing party, then it was not eligible for a fee award under the *Christiansburg* standard.

The Eighth Circuit rejected the EEOC's contention that it was the prevailing party. Pet. App. 17a-18a. However, the Court of Appeals vacated the district court's fee award with respect to the 84 individual claims dismissed on summary judgment and remanded the fee issue for a determination by the district court whether each individual claim was unreasonable under *Christiansburg*. *Id.* at 28a. The Eighth Circuit reversed the fee award with respect to the claims dismissed because of the EEOC's failure to satisfy Title VII's pre-suit requirements. It held that those

requirements were "prerequisite[s] to initiating a lawsuit" under *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 165-66 (2010), and not elements or ingredients of the EEOC's Title VII cause of action under *Arbaugh*. Pet. App. 21a. Therefore, under Eighth Circuit law, the unreasonableness of the EEOC's conduct could not be a basis for a fee award.

CRST petitioned for rehearing *en banc* which was denied on February 20, 2015. Pet App. 218a.

REASONS FOR GRANTING THE WRIT

As this Court recently recognized, before the EEOC can bring suit under Title VII, it "must try to remedy unlawful workplace practices through informal methods of conciliation." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649 (2015). After a complainant files a charge with the Commission, the EEOC must undertake an investigation. If it finds reasonable cause to believe the allegation has merit, it must then attempt to resolve the matter through informal and confidential conciliation. *Id.* Only if that process has been tried and failed may the Commission bring suit. *Id.* This requirement is central to the operation of the statutory scheme, and it is enforceable by courts. *Id.* at 1655-56.

As already noted, Title VII also provides for awards of attorney's fees and costs to prevailing parties, including to prevailing defendants if they can show that the plaintiff's case was unreasonable or frivolous within the meaning of *Christiansburg*. The question presented here is whether such fee awards are available where a claim is dismissed based on the

EEOC's total failure to comply with its pre-suit obligations or whether, as the Eighth Circuit held, fees are precluded in that situation because the victory was not sufficiently "on the merits."

That question warrants review because the Eighth Circuit's rule conflicts with the rule applied in at least three other circuits. Moreover, under this Court's decisions in *Christiansburg* and *Arbaugh*, there is good reason to treat the EEOC's failure to comply with pre-suit obligations — at least where it is sufficiently serious to require dismissal of a claim — as a failure to satisfy an element of the EEOC's case. Finally, there is no apparent statutory policy supporting a rule that allows fee awards when the EEOC brings a frivolous case but not when it flatly fails to fulfill a prerequisite to suit like investigation of the claim or conciliation.

In *Mach Mining*, the Court very recently addressed Title VII's conciliation requirement. Resolving a Circuit conflict, the Court held that the EEOC's conciliation obligations are enforceable by the defendant but subject only to "relatively barebones review." 135 S. Ct. at 1652. The Court went on to say that where a district court finds a failure to comply with conciliation obligations, the appropriate remedy is to stay the case and "order the EEOC to undertake the mandated efforts to obtain voluntary compliance." *Id.*

This case, however, involves much more than a failure to conciliate and consequently required a stronger remedy than granting a stay and giving the EEOC a second try. As described above, the EEOC failed altogether to investigate, find reasonable cause, or conciliate 152 individual claims before it litigated

them. When CRST moved for relief prior to deposition discovery from the EEOC's fast-increasing number of individual claims, the EEOC assured the district court that each of its individual claims had sufficient factual and legal support. After more than 150 depositions, several summary judgment motions addressing the EEOC's individual claims, and the district court's finding that the EEOC did not have even a *prima facie* claim that CRST had engaged in a pattern or practice of tolerating sexual harassment, it became clear the EEOC had no evidence supporting most of its individual claims and had not satisfied Title VII's pre-suit requirements for any of the claims upon which the fee award is based. Finding that the EEOC had "wholly abdicated" its pre-suit obligations, the district court held that the only commensurate remedy at that point was dismissal.[5] The Eighth Circuit properly

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[5] Unlike a mere failure to conciliate, a failure by the EEOC to investigate and find reasonable cause will seldom, if ever, be curable by a stay. As in this case, the issue will only be uncovered long after the defendant has incurred substantial fees and costs. The district court explained why a dismissal was the appropriate remedy in this case:

> Here, dismissal is a severe but appropriate remedy. Although dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom, to rule to the contrary would work a greater evil insofar as it would permit the EEOC to perfect an end-run around Title VII's "integrated, multistep enforcement procedure." *Occidental Life*, 432 U.S. at 355. It would ratify a "sue first, ask questions later" litigation strategy on the part of the EEOC, which would be anathema to Congressional intent. The court cannot ignore the law as it is written by Congress and construed by the

affirmed because it too found that "[t]he present record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women, thus we cannot conclude that the district court abused its discretion in dismissing the EEOC's suit." Pet. App. 115a-116a.[6]

The question whether fees may be awarded against the EEOC in circumstances like those presented here thus remains a live and important issue.

I. The Eighth Circuit's Holding That CRST Is Not a Prevailing Party for Purposes of an Attorney's Fee Award Conflicts Directly with Decisions of the Fourth, Ninth, and Eleventh Circuits.

If this case had been litigated in the Fourth, Ninth, or Eleventh Circuits, the district court's award of fees and costs to CRST would have been affirmed. Each of

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Eighth Circuit Court of Appeals in *Delight Wholesale* [973 F.2d 664, 668 (8th Cir. 1992)].

Pet. App. 214a-215a (internal footnote omitted).

[6] Nor is this case an isolated instance in which the EEOC "sued first and asked questions later." In *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152-54 (4th Cir. 2014), for example, the Fourth Circuit affirmed the district court's fee award to the defendant employer because the EEOC had filed suit despite being unable to identify any victims of the alleged employment discrimination. *See also EEOC v. Global Horizons, Inc.*, No. CV-11-3045-EFS, 2015 U.S. Dist. LEXIS 37674, at *35 (E.D. Wash. Mar. 19, 2015) (finding that defendant employer is entitled to a fee award because the EEOC filed the lawsuit alleging employment discrimination and harassment based on national origin without first conducting "a reasonable and diligent investigation").

those Circuits has held that a dismissal of a case based on the EEOC's failure to satisfy Title VII's pre-suit requirements entitles the prevailing defendant to an attorney's fee award if the *Christiansburg* unreasonableness standard is met. *See EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152-54 (4th Cir. 2014); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608-09 (9th Cir. 1982).

In *Propak*, the Fourth Circuit affirmed the district court's fee award to the defendant employer because the EEOC "acted unreasonably in initiating the litigation" without having identified potential individual claimants during its investigation. 746 F.3d at 152-54. Concurring, Judge Wilkinson explained why a fee award to a prevailing defendant is critically important in a case in which EEOC's investigation and reasonable cause determination did not justify the lawsuit the EEOC filed:

> The EEOC in particular brings suit against a wide range of employers for whom the defense of lawsuits may be prohibitively expensive. *Christiansburg* was sensitive to this problem, noting that "many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights."

Id. at 155 (Wilkinson, C.J., concurring), *quoting Christiansburg*, 434 U.S. at 423 n.20.

Similarly, in *Pierce Packing*, the Ninth Circuit held that a mere "exchange of letters between Pierce and the EEOC was inadequate to constitute legitimate conciliation," 669 F.2d at 608, and affirmed the district court's award of attorney's fees against the EEOC, *id.* at 609. It found support in the record for the district court's conclusion that the EEOC's "obvious disregard [of its conciliation obligations was] the apex of unreasonableness." *Id.* (quotation marks omitted). Finally, in *Asplundh*, the Eleventh Circuit agreed that the EEOC had not made a good faith effort to conciliate before suing and held that, "[u]nder these circumstances, the sanction of dismissal, awarding attorney's fees, is not an unreasonable remedy or an abuse of the district court's discretion." 340 F.3d at 1261.[7]

Here, however, the Eighth Circuit came to the opposite conclusion based on its rule that a dismissal of a case can be a basis for fees against the the EEOC only if it addresses the "merits" and that a dismissal based on its failure to satisfy its statutory pre-suit obligations does not count. There is thus a clear and direct circuit conflict.

Indeed, the conflict is even broader when one takes into account private suits litigated under Title VII as well as cases brought under 42 U.S.C. § 1983 in which

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[7] The Fifth Circuit has also agreed with these other three circuits in *dictum*. *See EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 469 (5th Cir. 2009) (dictum) ("The EEOC acts unreasonably in disregarding procedural requirements for suit, and attorney's fees may be awarded." (citing *Pierce Packing*, 669 F.2d at 609)).

fees may be awarded under 42 U.S.C. § 1988. In one such case, cited by the court below, Pet. App. 18a, the Eighth Circuit followed its rule that non-merits-based victories cannot form the basis of defendant fee awards. *See Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994).[8] But a different rule has been applied in other circuits. *See D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1236 (10th Cir. 2013) (fee award allowed where case dismissed on abstention grounds); *Neroni v. Becker*, No. 13-3903, __F. App'x __, 2015 U.S. App. LEXIS 6789, at *1-2 (2d Cir. Apr. 22, 2015) (summary order) (same); *Anthony v. Marion Cnty. Gen. Hosp.*, 617 F.2d 1164, 1169-70 (5th Cir. 1980) (fees allowed after case dismissed for want of prosecution); *see also Elwood v. Drescher*, 456 F.3d 943, 948-49 (9th Cir. 2006) (fees are not allowed after jurisdictional or abstention-based dismissals but are allowed after a dismissal based on Eleventh Amendment immunity).

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[8] *Marquart* relied in part on *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990), which held that a fee award cannot be made by a court that has determined it lacks jurisdiction over the case. There is a conflict on that question as well. *See, e.g., Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 926-28 (7th Cir. 2000); *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055-57 (10th Cir. 2004).

II. The Eighth Circuit's Holding That the EEOC's Failure to Satisfy Title VII's Pre-Suit Requirements Cannot Justify a Fee Award Is in Tension with *Arbaugh* and *Christiansburg*.

Even assuming that the Eighth Circuit was right to require a victory "on the merits" before a prevailing defendant can be awarded fees, this Court's decision in *Arbaugh* strongly suggests that this requirement was met here. In *Arbaugh*, the Court addressed the rule that Title VII applies only to employers with 15 or more employees. The question presented was whether that requirement "is 'jurisdictional' or relates to the 'merits' of a Title VII claim." 546 U.S. at 513. The Court held that numerosity is a non-jurisdictional element of the plaintiffs' case under Title VII. *Id.* at 515.

Arbaugh thus supports the proposition that the "merits" in a Title VII case extend beyond questions relating to whether illegal discrimination occurred and include at least one prerequisite to liability, numerosity. For that reason, the Eighth Circuit presumably would allow an award of fees where the EEOC brought a frivolous lawsuit that was dismissed solely on the ground that the defendant had too few employees to violate Title VII.

It would be logical to treat the issue of the EEOC's satisfaction of its statutory pre-suit duties in a similar fashion. Far from being a mere technicality, Title VII's pre-suit requirements are the very means by which EEOC defines the nature and scope of the claims it is

permitted to litigate. As the Eighth Circuit put it in the prior appeal in this case:

> [t]he permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge. The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or *developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

Pet. App. 109a (emphasis in original), *quoting EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668 (8th Cir. 1992).

Indeed, this Court in its recent *Mach Mining* decision emphasized that Title VII's "conciliation provision explicitly serves a substantive mission: to 'eliminate' unlawful discrimination from the workplace. 42 U.S.C. § 2000e–5(b)." *Mach Mining*, 135 S. Ct. at 1654. The same is equally true for Title VII's requirements that the EEOC investigate and find reasonable cause before filing suit.

The panel below ruled, however, that a complete failure to undertake the required Title VII pre-suit process was sufficiently different from a failure to satisfy *Arbaugh*'s numerosity requirement that it

cannot be a basis for a fee award. In so doing, it relied on this Court's decision in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). The issue there was whether the requirement that a copyright be registered before certain copyright claims may be litigated is jurisdictional. Applying *Arbaugh*, this Court said no. In reaching this conclusion, it drew a distinction between requirements that are elements of claims, as in *Arbaugh*, and a requirement that is a "prerequisite to initiating a lawsuit," such as copyright registration. *Id.* at 165-66. But it concluded that this distinction made no difference because both could be non-jurisdictional.

The panel in this case embraced this distinction and made it dispositive of CRST's eligibility for fees, even though *Reed Elsevier* obviously was not addressing anything about attorney's fees. But the panel never explained why it would make sense to draw a line, for fee purposes, between dismissals based on numerosity and dismissals based on failure to investigate, find reasonable cause and conciliate as Title VII also requires. It simply construed the Eighth Circuit's "merits only" rule very strictly and used *Reed Elsevier* as a readily available explanation of why it was drawing an otherwise seemingly irrational line.

Like *Arbaugh*, *Christiansburg* itself strongly suggests that the Eighth Circuit has gone astray in applying a rule precluding fees where a defendant prevails by demonstrating the EEOC's unreasonable failure to investigate, find reasonable cause, and conciliate before filing suit. That is because

Christiansburg itself involved a barrier to suit far afield from the merits of any discrimination suit.

In *Christiansburg*, the EEOC had notified the charging party in that case that its conciliation efforts had failed and that she had a right to sue the employer in federal court, but she did not do so. In 1972, approximately two years after the EEOC had sent that right-to-sue letter and terminated the administrative proceeding, Congress amended Title VII by authorizing the EEOC to sue in its own name and also permitted such suits with respect to any "charges pending with the Commission" on the effective date of the amending legislation. 434 U.S. at 414 (quotation marks omitted). The EEOC tried to use this authorization to bring suit on behalf of the charging party. The district court dismissed the EEOC's action because the charge had not been pending on the relevant date. *Id.* The defendant then requested an award of its attorney's fees, but the district court held that such an award was not justified. The court of appeals affirmed, with one judge dissenting.

This Court, after defining the standard for fee awards to prevailing defendants, affirmed the denial of fees to the defendant because the district court had applied the correct legal principles and had not abused its discretion. This Court specifically noted the district court's holding that the statutory interpretation upon which the EEOC's case was dismissed was an issue of first impression and that "the Commission's statutory interpretation of § 14 of the 1972 amendments was not frivolous." *Id.* at 423-24 (internal quotation marks omitted).

But, significantly, the Court did not hold or even suggest that the defendant was ineligible for a fee award because the ground for dismissal was lack of standing, not the EEOC's failure to establish substantive elements of its Title VII cause of action. Thus, at least by negative implication, *Christiansburg* supports the proposition that what matters for fee purposes is the reasonableness of the plaintiff's actions, not whether the dismissal satisfied some arbitrary requirement of being "on the merits."

III. The Eighth Circuit Rule Makes Little Sense.

Putting aside the glaring conflicts with other circuits and the tension with this Court's own rulings, the decision below is utterly inexplicable as a matter of statutory policy. Congress enacted Title VII's pre-suit requirements to prevent the EEOC from causing unjustified costs and disruption to an employer by filing unfounded or unduly broad claims and not attempting in good faith to settle such claims before litigating them. Awarding attorney's fees to the prevailing defendant based upon the EEOC's unreasonable failure to satisfy Title VII's pre-suit requirements is essential to enforcing those statutory requirements.

When Congress in 1972 authorized the EEOC for the first time to enforce Title VII through litigation in its own name rather than through the Department of Justice, Congress enacted Title VII's pre-suit requirements as a limitation on the EEOC's authority to sue. As the legislative history of the 1972 legislation demonstrates, Congress imposed the pre-suit requirements to avoid the disruption and cost to the

defendant employer of unfounded or unreasonably expansive lawsuits:

> The Commission wants to pursue through discovery those issues which it chose not to pursue in conciliation. This approach leads to the abuse of discovery. Congress maintained the provisions for conciliation and voluntary compliance when it passed the 1972 Amendments in order to prevent interminable litigation which would be a burden on both the EEOC and the district courts, not to mention the entities which are sued. *See EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974).

EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977) (footnote omitted).

As both lower courts found, this case presents a flagrant violation of those statutory protections by the EEOC. The district court, after rejecting EEOC's pattern or practice allegation and making more than 100 individual summary judgment decisions, found that the EEOC had "wholly abandoned" its statutory pre-suit obligations. Pet. App. 204a. The Eighth Circuit similarly found that "[t]he present record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women . . . ." Pet. App. 115a-116a. Yet the Eighth Circuit reversed the fee award compensating CRST for some measure of the litigation cost it incurred that was caused by the EEOC's dereliction of its statutory duty.

Appendix A

United States Court of Appeals
Eighth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Plaintiff–Appellant

v.

CRST VAN EXPEDITED, INC. Defendant–Appellee.

No. 13–3159.
Submitted: Sept. 11, 2014.
Filed: Dec. 22, 2014.
Rehearing and Rehearing En Banc Denied Feb. 20, 2015

Before RILEY, Chief Judge, SMITH and KELLY, Circuit Judges.

SMITH, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) appeals the district court's award of $4,694,442.14 in attorneys' fees, expenses, and costs to CRST Van Expedited, Inc. (CRST) following the parties' $50,000 settlement of the only remaining claim, out of 154 individual claims, against CRST. For the reasons discussed *infra*, we reverse and remand for further proceedings consistent with this opinion.

I. Background

A more extensive factual background of this case is available in our prior opinion. *See EEOC v. CRST Van*

Expedited, Inc., 679 F.3d 657 (8th Cir. 2012) ("*CRST IV*"). We will provide only an abbreviated procedural history to provide context for the present dispute.

A. Underlying Action

"The ... EEOC ... filed suit in its own name against CRST ..., alleging that CRST subjected Monika Starke 'and approximately 270 similarly situated female employees' to a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 ('Title VII'), 42 U.S.C. § 2000e *et seq.*" *Id.* at 664. Specifically, "[t]he EEOC alleged that CRST was responsible for severe and pervasive sexual harassment in its New–Driver Training Program ('Training Program')." *Id.* at 665.

Thereafter, the district "court granted Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Starke and Latetsha Thomas's request to intervene." *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2013 WL 3984478, at *4 n.5 (N.D. Iowa Aug. 1, 2013) ("*CRST III*").

For approximately two years after the filing of the suit, the EEOC failed to identify the women comprising the putative class; as a result, the district court ordered the EEOC "to (1) immediately amend its list of 270 women as soon as it learned of any women whose claims it no longer wished to pursue and (2) make all women on whose behalf it sought relief available to CRST for deposition." *CRST IV*, 679 F.3d at 670 (citation omitted). The penalty for failing to present a particular woman for deposition before the conclusion of discovery "would result in a 'discovery sanction' forbidding that woman from testifying at trial and

barring the EEOC from seeking relief on her behalf in the case." *Id.* (citation omitted). "Although the EEOC complied with the court's directive and filed updated and corrected lists of allegedly aggrieved individuals, it failed to make all of the identified individuals available for deposition before [the deadline]." *CRST III*, 2013 WL 3984478, at *3. The district court then enforced its prior order and "barred the EEOC from pursuing relief for any individual not made available for deposition before the deadline." *Id.* Thereafter, "the EEOC filed an Updated List of Class Members, which listed 155 allegedly aggrieved individuals for whom the EEOC was still pursuing relief and 99 individuals who the EEOC alleged were sexually harassed but for whom the EEOC was not pursuing relief based on the court's ... [o]rder." *Id.* (footnote omitted).

In a series of orders, the district court ruled on CRST's various motions for summary judgment. First, CRST moved for summary judgment on the EEOC's purported pattern-or-practice claim. The district court found the motion "odd" because no "pattern[-]or[-]practice claim" appeared in the EEOC's complaint. "'[T]he EEOC did *not* allege that CRST was engaged in 'a pattern or practice of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII, 42 U.S.C. § 2000e–6.'" *CRST IV*, 679 F.3d at 676 n.13 (quoting *EEOC v. CRST Van Expedited, Inc.* ("*CRST II*"), No. 07–CV–95–LRR, 2009 WL 2524402, at *7 n.14 (N.D. Iowa Aug. 13, 2009)).

> The district court had "*assumed* [that] the EEOC had the right to maintain a pattern-or-practice claim in this case but

> dismissed it with prejudice. The court held as a matter of law that there was insufficient evidence from which a reasonable jury could find that it was CRST's 'standard operating procedure' to tolerate sexual harassment."[1]

Id. (alteration in original) (emphasis added) (quoting *CRST II*, 2009 WL 2524402, at *7 n.14); *see also CRST III*, 2013 WL 3984478, at *3 ("Specifically, the court held that, to the extent the EEOC asserted a pattern [-]or[-]practice claim, such claim was dismissed with prejudice and, consequently, CRST was liable only to the extent the EEOC could prove individual claims of sexual harassment."). In *CRST IV*, "[w]e, like the district court, 'express[ed] no view as to whether the EEOC's investigation, determination and conciliation of Starke's Charge would be sufficient to support a *pattern [-]or-practice* lawsuit.' "679 F.3d at 676 n.13 (quoting *CRST II*, 2009 WL 2524402, at *16 n.21).

Second, CRST moved for summary judgment based on the statute of limitations and other grounds; the district court "found that the applicable statute of limitations barred the EEOC from seeking relief on behalf of 9 individuals and barred, in part, the EEOC from seeking relief on behalf of another 3 individuals." *CRST III*, 2013 WL 3984478, at *3 (citation omitted).

Third, "the district court granted CRST summary judgment against three women, including Starke,

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[1]In its April 30, 2009 order, the district court stated, "In other words, the court assumes without deciding that this is a sexual harassment pattern[-]or[-]practice case."

reasoning that the women were judicially estopped from prosecuting their claims." *CRST IV*, 679 F.3d at 670 (footnote omitted) (citing *EEOC v. CRST Van Expedited, Inc.* ("*CRST I*"), 614 F. Supp. 2d 968 (N.D. Iowa 2009)).

Fourth, CRST moved for summary judgment against certain interveners' claims, and the district court granted in part and denied in part the motion. *CRST III*, 2013 WL 3984478, at *4. The court concluded that Boot's claims were frivolous or, in the alternative, that she did not generate a genuine issue of material fact regarding CRST's knowledge of the purported harassment and CRST's alleged failure to take proper remedial action. *Id.* Additionally, the court dismissed Peeples's claims and Nicole Cinquemano's claims, concluding that CRST lacked actual or constructive knowledge of the alleged harassment. *Id.* "The court further held that the EEOC was barred from seeking relief at trial to the same extent these Plaintiffs–Interveners were barred." *Id.* (citation omitted).

Fifth, CRST moved for summary judgment based on the class members' failure to report the alleged harassment or CRST's prompt and effective response to the reported harassment. *Id.* The district court granted the motion in part and denied it in part, finding "that the EEOC was barred from seeking relief on behalf of [(1)] 11 individuals because CRST did not know or have reason to know that they were sexually harassed and [(2)] 4 individuals because CRST adequately addressed the sexual harassment." *Id.*

Sixth, CRST moved for summary judgment against class members who did not experience severe or pervasive sexual harassment, and the court granted the motion in part and denied it in part, concluding "that the EEOC had failed to generate a genuine issue of material fact as to whether 11 individuals had experienced severe or pervasive sexual harassment and, consequently, held that the EEOC was barred from seeking relief on their behalf." *Id.*

Seventh, CRST moved for summary judgment against class members whose claims purportedly failed on two or more grounds, and the court granted the motion in part and denied it in part. *Id.* The court prohibited the EEOC from seeking relief on behalf of 46 women. *Id.* The EEOC conceded that "4 individuals did not suffer actionable sexual harassment," and the court

> found that a reasonable jury could not find 42 individuals suffered from actionable sexual harassment because they did not suffer severe or pervasive sexual harassment and/or there was insufficient evidence to show that CRST knew or should have known that the individuals suffered sexual harassment yet failed to take proper remedial action.

Id.

"Finally, ... the district court barred the EEOC from seeking relief for the remaining 67 women after concluding that the EEOC had failed to conduct a reasonable investigation and *bona fide* conciliation of these claims—statutory conditions precedent to

instituting suit." *CRST IV*, 679 F.3d at 671 (citing *CRST II*, 2009 WL 2524402). The district court dismissed the EEOC's complaint because it had "disposed of all the allegedly aggrieved women in the EEOC's putative 'class.'" *Id.*

After the district court dismissed the action, CRST filed a bill of costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920 and moved for attorneys' fees pursuant to 42 U.S.C. § 2000e–5(k). The district "court awarded CRST $92,842.21 in costs, $4,004,371.65 in attorneys' fees[,] and $463,071.25 in out-of-pocket expenses, for a total of $4,560,285.11." *CRST III*, 2013 WL 3984478, at *5 (citations omitted).

B. Appeal

"[T]he EEOC appeal[ed] the district court's dismissal of its claims as to 107 women." *CRST IV*, 679 F.3d at 670. On appeal, the EEOC argued that the district court (1) erroneously barred it "from pursuing claims as to 67 women based on its failure to reasonably investigate or good-faith conciliate," *id.* at 671; (2) erroneously granted summary judgment on Starke's, Payne's, and Timmons's individual claims, as well as on the EEOC's claims on their behalf, based on judicial estoppel, *id.* at 677; (3) erroneously granted summary judgment on the merits of several of its hostile work-environment claims against CRST, *id.* at 682–86; and (4) abused its discretion in awarding CRST attorneys' fees and expenses, *id.* at 694.

After analyzing each of the EEOC's contentions,

> we affirm[ed] in part, reverse[d] in part, and remand[ed] for further proceedings consistent

> with this opinion. Specifically, we reverse[d] the district court's grant of summary judgment on the EEOC's claims as to Monika Starke because the EEOC, suing as a plaintiff in its own name under § 706, may not be judicially estopped because of Starke's independent conduct. Additionally, we reverse[d] the district court's grant of summary judgment on the EEOC's claims on behalf of Tillie Jones because the EEOC ... produced sufficient evidence to create a genuine fact issue as to the severity or pervasiveness of harassment that she allegedly suffered. Finally, we vacate [d], without prejudice, the district court's award of attorneys' fees to CRST because, in light of these aforementioned rulings, CRST [wa]s no longer a "prevailing" defendant under 42 U.S.C. § 2000e–5(k). We affirm[ed] the remainder of the district court's orders and remand[ed] for further proceedings consistent with th[e] opinion.

CRST IV, 679 F.3d at 695 (footnote omitted).

C. Remand

On remand, the EEOC withdrew its claim on behalf of Jones, explaining that "the law of the case, specifically this Court's order of August 13, 2009 ..., bars its claim on behalf of Tillie Jones." The referenced order was the one in which the district court barred the EEOC from seeking relief on behalf of some claimants for the EEOC's failure to fulfill the statutory conditions precedent to instituting suit, i.e., a reasonable investigation and *bona fide* conciliation.

Subsequently, CRST and the EEOC settled the case and jointly moved for an order of dismissal. The Settlement Agreement that the parties entered provided that CRST would pay $50,000 in settlement of the EEOC's claim on behalf of Starke. It further provided:

> 4. This Agreement does not preclude CRST from pursuing attorney[s'] fees and costs pursuant to the Order of the Eighth Circuit dated May 8, 2012.
>
> 5. Further, this Agreement does not preclude either [the] EEOC or CRST from making any arguments relating to CRST's pursuit of attorney[s'] fees and costs, including arguments relating to whether [the] EEOC or CRST is the prevailing party.

The district court granted the motion to dismiss, and CRST then filed a bill of costs and moved for an award of attorneys' fees. The EEOC resisted the bill of costs and motion for attorneys' fees. First, it argued that its "case was comprised of a single claim and that it won that claim." *CRST III*, 2013 WL 3984478, at *9. The district court found this argument meritless, concluding that "on the face of the Complaint, it is clear that the EEOC sought relief on behalf of at least two individuals and, thus, there were at least two claims," i.e., Starke's claim and at least one class member's claim. *Id.* Ultimately, the court found "that the EEOC asserted multiple and distinct claims against CRST" and that CRST only lost on one of those claims—Starke's claim. *Id.* at *10. Applying Supreme Court precedent, the court reasoned that "CRST need

not prevail on every claim to be entitled to an award of attorneys' fees"; therefore, it "consider[ed] whether there was a judicial determination on the merits in favor of CRST on each claim other than the claim on behalf of Starke." *Id.* (citing *Fox v. Vice*, —— U.S. ——, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011)).

Second, the EEOC argued that CRST was not a prevailing defendant because "'a large portion of the claim was not determined on the merits.'" *Id.* (citation omitted). The EEOC conceded "that 'CRST defeated the claim on the merits for 83 women for whom it was granted summary judgment.'" *Id.* (citation omitted). But it "argue[d] that 'CRST won on reasons other than the merits as to [98] of the women who were never deposed, and as to 67 women for whom ... [the] EEOC failed to meet the statutory prerequisites for suit.'" *Id.* (alterations in original) (citation omitted). The court rejected the EEOC's argument.

As an initial matter, it found that CRST was the prevailing party as to the EEOC's pattern-or-practice claim despite the EEOC's argument that it never asserted a pattern-or-practice claim in its complaint. The court reasoned "that CRST justifiably filed a motion for summary judgment on the pattern-or-practice claim given the confusion the EEOC created as to whether it was pursuing such a claim" and that the court subsequently granted CRST's motion for summary judgment on the merits of that claim. *Id.* (citation omitted).

The court then observed that after the dismissal of the purported pattern-or-practice claim, "there were 154 allegedly aggrieved individuals remaining and,

thus, CRST was required to defend against 154 sexual harassment claims." *Id.* (footnote omitted). The court rejected the EEOC's contention that "the court's dismissal of claims due to the EEOC's failure to satisfy the Title VII administrative prerequisites is not a judicial determination on the merits." *Id.* The court found that the EEOC's obligation to pursue administrative resolution is "an ingredient of the EEOC's claim" as opposed to a "jurisdictional prerequisite"; therefore, the court concluded that its "dismissal of claims due to the EEOC's failure to satisfy its pre-suit obligations is a dismissal on the merits of the EEOC's claims." *Id.*

The court also found that CRST was a prevailing party as to Jones's claim because, although the EEOC voluntarily dismissed the claim on remand, "had the EEOC not withdrawn its claim on behalf of Jones, the court would have dismissed it pursuant to its August 13, 2009 Order." *Id.* at *11.

Having determined that "CRST is the prevailing party on the EEOC's pattern-or-practice claim and 153 of the EEOC's individual claims," the court then "consider[ed] whether those claims on which CRST prevailed are frivolous, unreasonable or groundless." *Id.*

The district court *did not* individually analyze whether each of the 153 claims and purported pattern-or-practice claim were frivolous, unreasonable, or groundless. Instead, in summary fashion, it found that all the claims satisfied this standard.

As to attorneys' fees, expenses, and costs, the court concluded that CRST was entitled to $3,724,065.63 in attorneys' fees incurred pre-appeal. *Id.* at *18.

The court also awarded CRST "the reasonable amount of attorneys' fees incurred during the appeal proceedings" in the amount of $465,230.47. *Id.* at *18–19. The court justified its award as follows:

> Specifically, the court has already found that CRST is the prevailing party and that the *Christiansburg* [2] standard is satisfied as to all of the claims that the EEOC appealed, other than the claim on behalf of Starke. Moreover, the court finds that CRST provided sufficient documentation and, as discussed above, the court finds that $465,230.47 reflects the total appellate fees that CRST would not have incurred but for the EEOC's unreasonable or groundless claims.

Id. at *19.

Thus, the district court awarded $4,189,296.10 in attorneys' fees. *Id.* at *21. And, the court awarded $413,387.58 in out-of-pocket expenses to CRST. *Id.* Finally, the court also awarded CRST $91,758.46 in costs. *Id.*

In total, the court found that CRST was entitled to $4,694,442.14 for attorneys' fees, expenses, and costs. *Id.*

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[2] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978).

II. Discussion

On appeal, the EEOC argues that the district court erred in awarding $4,694,442.14 for attorneys' fees, expenses, and costs to CRST. First, the EEOC argues that the district court erred in finding that CRST was the prevailing party because it "erroneously viewed [the] EEOC's case as 154 separate claims and thought CRST deserved fees for its success on 153 of them." The EEOC maintains that it "had only one claim—that CRST violated Title VII by failing to prevent and remedy sexual harassment of its female trainees and drivers—and EEOC's settlement obtaining relief for one claimant was sufficient to render [the] EEOC the prevailing party." Second, the EEOC argues that the district court erroneously concluded that its dismissal of the "EEOC's claim based on deficiencies in its presuit processing constituted a ruling on the merits of [the] EEOC's claim." According to the EEOC, a dismissal based on failure to satisfy presuit obligations does not equate to a merits-based decision necessary for the court to find CRST to be a prevailing party. Third, the EEOC asserts that even if this court agrees with the district court that CRST is a prevailing party, "the district court erred in awarding fees to CRST because [the] EEOC's claim and conduct of this litigation were not frivolous, groundless, or unreasonable." Finally, the EEOC contends that the district court erred in awarding CRST appellate fees because the "EEOC's decision to appeal the initial dismissal of its case was reasonable, grounded in sound legal precedent, and supported by a reasonable hope of

reversal on appeal." We consider each of these arguments in turn.

Whether a party is a "prevailing party" is a question of law that we review de novo. *DocMagic, Inc. v. Mortgage P'ship of Am., L.L.C.*, 729 F.3d 808, 812 (8th Cir. 2013). "We review for an abuse of discretion the district court's actual award of fees and costs." *Id.*

"It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees." *Christiansburg*, 434 U.S. at 415, 98 S. Ct. 694 (citation omitted). "But Congress has authorized courts to deviate from this background rule in certain types of cases by shifting fees from one party to another." *Fox*, 131 S. Ct. at 2213 (citing *Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) (listing federal fee-shifting provisions)). Like 42 U.S.C. § 1988, 42 U.S.C. § 2000e–5(k) is one of those "fee-shifting" provisions. *Burlington*, 505 U.S. at 562, 112 S. Ct. 2638. "The standards for assessing claims for attorney's fees pursuant to section 1988 and under the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5(k), are identical." *Barnes Found. v. Township of Lower Merion*, 242 F.3d 151, 158 n.6 (3d Cir. 2001) (citations omitted). As a result, "cases used to interpret one statute may be used to interpret the other." *Id.* (citations omitted).

Just as § 1988 "allows the award of 'a reasonable attorney's fee' to 'the prevailing party,'" *Fox*, 131 S. Ct. at 2213, so too does § 2000e–5(k). 42 U.S.C. § 2000e–5(k) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."). Section 2000e–5(k) "authoriz[es] the award of attorney's fees to either plaintiffs *or defendants*, and entrust[s] the effectuation of the statutory policy to the discretion of the district courts." *Christiansburg*, 434 U.S. at 416, 98 S. Ct. 694 (emphasis added) (footnote omitted).

With this legal framework in mind, we now address each of the EEOC's arguments in favor of reversal.

1. Single v. Multiple Claims

First, the EEOC argues that CRST cannot be a prevailing party because the EEOC brought only one "claim" against CRST—that CRST violated Title VII by failing to prevent an remedy sexual harassment of its female trainees and drivers—and CRST did not prevail on this claim, as evidenced by the EEOC obtaining a $50,000 settlement on Starke's behalf.[3]

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[3] The EEOC argues at length that it is a "prevailing party" plaintiff because it obtained the $50,000 settlement on Starke's behalf. We need not address whether the EEOC is a "prevailing plaintiff" and instead focus on whether CRST is a "prevailing defendant" because, as the district court explained, the EEOC "is not entitled to a fee award under 42 U.S.C. § 2000e–5(k)." *CRST*

Our task is to determine (1) how many claims the EEOC alleged in its complaint and (2) what types of claims it alleged.

"Section 706 of Title VII authorizes the EEOC to bring claims involving the rights of aggrieved individuals challenging an unlawful employment practice on an individual or class-wide basis[.]" *U.S. EEOC v. Global Horizons, Inc.*, 860 F. Supp. 2d 1172, 1191 (D. Haw. 2012) (citations omitted). The EEOC may "seek class action-type relief without complying with ... Federal Rule of Civil Procedure 23." *Id.* (quotation and citations omitted).

Here, the EEOC brought suit under Title VII "to correct unlawful employment practices on the basis of sex, and to provide appropriate relief to Monika Starke *and* a class of similarly situated female employees of defendant CRST." (Emphasis added.) The "Statement of Claims" provides that "two of [CRST's] lead drivers subjected Starke to sexual harassment during their supervision of Starke" and that "[o]ther similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST."

III, 2013 WL 3984478, at *10 n.7 (citation omitted). This is because § 2000e–5(k) permits fees to prevailing parties "other than the Commission or the United States." "Thus, it is of no consequence whether the EEOC qualifies as a prevailing party." *CRST III*, 2013 WL 3984478, at *10 n.7.

We agree with the district court that the EEOC alleged more than one claim. As the court explained, although the EEOC did not specify "how many individuals the EEOC was pursuing relief on behalf of until the litigation was well under way," "the face of the Complaint" shows that "the EEOC sought relief on behalf of at least two individuals and, thus, there were at least two [sexual-harassment] claims. By October 15, 2008, it became clear that the EEOC was asserting approximately 270 claims, although that number dropped to 255 by May 12, 2009." *CRST III*, 2013 WL 3984478, at *9. Furthermore, the EEOC's argument that it asserted only one claim against CRST in its complaint is undermined by our prior opinion. Throughout the opinion, we referred to the EEOC's "claims." *CRST IV*, 679 F.3d at 670–74, 682–83, 685, 688, 689–90, 694–95. We disagree with the EEOC's assertion that we used the term "claims" in the "non-technical sense." For example, we explained that "our de novo review of the EEOC's *claims concerning each woman* confirms the district court's conclusion that no fact issue remained" as to each woman's sexual-harassment claim. *Id.* at 690 (emphasis added). Therefore, we agree with the district court "that this case contained multiple and distinct claims for relief." *CRST III*, 2013 WL 3984478, at *9.

As to what types of claims the EEOC's complaint alleges, we reiterate our prior observation in the first appeal that "'the EEOC did *not* allege that CRST was engaged in 'a pattern or practice' of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII, 42 U.S.C. § 2000e–6.'" *CRST IV*, 679

F.3d at 676 n.13 (quoting *CRST II*, 2009 WL 2524402, at *7 n.14). The district court merely *assumed without deciding* that the EEOC brought a pattern-or-practice claim and dismissed it with prejudice. *Id.* But the face of the complaint alleges no pattern-or-practice claim; therefore, it "seeks only to vindicate the rights of the individuals under Section 706." *U.S. EEOC v. Pioneer Hotel, Inc.*, No. 2:11–CV–1588–LRH–RJJ, 2013 WL 129390, at *4 (D. Nev. Jan. 9, 2013). Accordingly, to the extent that the district court's order awarded attorneys' fees to CRST based on a purported pattern-or-practice claim, we reverse.

In summary, we find that the EEOC's complaint alleged multiple sexual-harassment claims seeking to vindicate the rights of individuals.

2. Ruling on the Merits

The EEOC next argues that the district court's dismissal of 67 claims for the EEOC's failure to satisfy Title VII's presuit obligations does not constitute a ruling on the merits; therefore, the EEOC contends, CRST cannot be a prevailing party with respect to those claims.

"[P]roof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits." *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994) (citation omitted). "At the very least, this means that the [defendant] must have made a motion for summary judgment on the merits," as opposed to, for example, moving for dismissal for lack of subject

matter jurisdiction, on res judicata grounds, or on statute-of-limitations grounds. *Id.* (citations omitted) (holding that defendant was not a prevailing party for award of attorney fees in Title VII action where plaintiff took voluntary dismissal with prejudice before any summary judgment motion was made).

We previously set forth the EEOC's presuit obligations in *CRST IV*:

> First, an employee files with the EEOC a charge "alleging that an employer has engaged in an unlawful employment practice." [*Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359, 97 S. Ct. 2447, 53 L. Ed. 2d 402(1977)]. Second, "[t]he EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Id.* If reasonable cause does exist, the EEOC moves to the third step, which attempts to remedy the objectionable employment practice through the informal, nonjudicial means "'of conference, conciliation, and persuasion.'" *Id.* (quoting 42 U.S.C. § 2000e–5(b)). However, if unsuccessful, the EEOC may move to the fourth and final step and bring a civil action to redress the charge. *Id.* at 359–60, 97 S. Ct. 2447 (quoting 42 U.S.C. § 2000e–5(f)(1)).

679 F.3d at 672 (alteration in original).

The EEOC's ability to bring suit and the administrative process are "*sequential steps in a unified scheme* for securing compliance with Title VII." *Id.* (quotations and citations omitted).

Whether the district court's dismissal of several claims for failure of the EEOC to satisfy its Title VII presuit obligations constitutes a ruling on the merits depends on whether such presuit obligations constitute claim elements, as opposed to jurisdictional prerequisites or nonjurisdictional prerequisites to filing suit. In *Arbaugh v. Y & H Corp.*, the Supreme Court addressed "whether the numerical qualification contained in Title VII's definition of 'employer' affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief." 546 U.S. 500, 503, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). Title VII requires "as a prerequisite to its application, the existence of a particular fact, *i.e.*, 15 or more employees." *Id.* at 513, 126 S. Ct. 1235. The Court observed that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516, 126 S. Ct. 1235. "Applying that readily administrable bright line to th[at] case, [the Court] h[e]ld that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." *Id.*

After *Arbaugh*, the Fifth Circuit "conclude[d] that the EEOC's conciliation requirement is a precondition to suit but not a jurisdictional prerequisite." *EEOC v. Agro Distrib., Inc.*, 555 F.3d 462, 469 (5th Cir. 2009). As a result, it held that the EEOC's failure to conciliate does not deprive a federal court of subject matter jurisdiction. *Id.* But the Fifth Circuit *did not* address whether conciliation is an element of the Title VII claim

or merely a nonjurisdictional prerequisite to filing suit. *See id.*

Thereafter, the Supreme Court again addressed the issue of prerequisites to filing suit in *Reed Elsevier, Inc. v. Muchnick*, holding that the Copyright Act's requirement that copyright holders register their works before suing for copyright infringement "is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." 559 U.S. 154, 157, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010). The Court reached this conclusion by comparing the numerosity requirement examined in *Arbaugh* to the Copyright Act's registration requirement and finding that neither were jurisdictional requirements. *Id.* at 161–66, 130 S. Ct. 1237. But the Court also noted a difference between the numerosity requirement at issue in *Arbaugh* and the registration requirement, stating, "That the numerosity requirement in *Arbaugh* could be considered an element of a Title VII claim, *rather than a prerequisite to initiating a lawsuit*, does not change this conclusion...." *Id.* at 165–66, 130 S. Ct. 1237 (emphasis added). According to the Court, "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.'" *Id.* at 166, 130 S. Ct. 1237 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982)). The Court concluded that the registration requirement fit the "mold" of a nonjurisdictional prerequisite to filing suit because it "imposes a precondition to filing a claim that is not clearly labeled jurisdictional, is not located in a jurisdiction-granting

provision, and admits of congressionally authorized exceptions." *Id.* (citation omitted). As a result, the Court found that the registration requirement "imposes a type of precondition to suit that supports nonjurisdictional treatment under our precedents." *Id.*

Here, neither party argues that the EEOC's preconditions to filing suit are jurisdictional. *See Agro*, 555 F.3d at 469. Instead, the EEOC argues that its Title VII presuit obligations are nonjurisdictional preconditions, as in *Reed*, while CRST argues that such requirements are elements of the EEOC's cause of action, as in *Arbaugh*. If CRST is correct, then the district court's dismissal of claims for the EEOC's failure to satisfy its presuit obligations would constitute a ruling on the merits, as the EEOC would have failed to satisfy elements of the claims at issue.

Reed makes clear that a statutory condition, although not jurisdictional, may be a nonjurisdictional precondition to filing suit, as opposed to an element of the claim. *See id.* at 165–66, 130 S. Ct. 1237. We agree with the EEOC that its presuit obligations constitute nonjurisdictional preconditions that *are not* elements of the claim. The EEOC's Title VII presuit obligations set forth in 42 U.S.C. § 2005e–5(b) are more akin to the registration requirement in *Reed*. First, Title VII requires the EEOC to issue a reasonable cause finding and attempt conciliation before filing *any* lawsuit, not just a sexual-harassment lawsuit. *See* 42 U.S.C. § 2000e–5(b).

Second, we have never labeled such presuit obligations as "elements" of a Title VII sexual-harassment claim. Instead, as we explained in

CRST IV, a plaintiff asserting a Title VII claim must show

> (1) [that she belongs to] a protected group; (2) [that she suffered] unwelcome harassment; (3) [that there was] a causal nexus between the harassment and her membership in the protected group; (4) that the harassment affected a term, condition, or privilege of [her] employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

679 F.3d at 685 (alterations in original) (quotations and citations omitted).

Finally, in contrast to the Title VII numerosity requirement at issue in *Arbaugh*, the EEOC's Title VII presuit obligations do not distinguish which employers are subject to Title VII or whether an employer has violated Title VII. Instead, the EEOC's compliance with its presuit obligations provides employers an opportunity to resolve the dispute in lieu of litigation.

Because the EEOC's Title VII presuit obligations are not elements of the claim, the district court's dismissal of 67 claims for the EEOC's failure to satisfy Title VII's presuit obligations does not constitute a ruling on the merits. Therefore, CRST is not a prevailing party as to these claims, and it is not entitled

to an award of attorneys' fees on such claims. *See Marquart*, 26 F.3d at 852.[4]

3. Frivolous, Groundless, Unreasonable

Having determined that CRST may not recover attorneys' fees for (1) claims that the district court dismissed based on the EEOC's failure to satisfy its presuit obligations and (2) the purported pattern-or-practice claim, we next address whether CRST is entitled to an award of attorneys' fees based on "several of the district court's dispositive rulings concerning the merits of [the EEOC's] hostile work-environment claims against CRST." *CRST IV*, 679 F.3d at 682–83.

"In interpreting section 706(k) [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5(k),] the Supreme Court has distinguished between prevailing Title VII plaintiffs and prevailing Title VII defendants." *Marquart*, 26 F.3d at 848. A district "court may award attorneys' fees to a prevailing Title VII plaintiff in all but very unusual circumstances." *Id.* (quotation and citation omitted). By contrast, a district "court may not award attorneys' fees to a prevailing Title VII defendant unless the 'court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" *Id.* (alteration in original) (quoting *Christiansburg*, 434 U.S. at 422, 98 S. Ct. 694).

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[4] For the same reason, CRST is not a prevailing party as to Jones's claim, which the EEOC voluntarily dismissed for its failure to satisfy its presuit obligations.

"In applying these criteria," the district court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421–22, 98 S. Ct. 694. "This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Id.* at 422, 98 S. Ct. 694. "[T]he course of litigation is rarely predictable," and "[d]ecisive facts may not emerge until discovery or trial." *Id.* Additionally, "[t]he law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* "Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* "So long as the plaintiff has some basis for the discrimination claim, a prevailing defendant may not recover attorneys' fees." *EEOC v. Kenneth Balk & Assocs.*, 813 F.2d 197, 198 (8th Cir. 1987) (quotation and citation omitted).

In summary, "a prevailing Title VII defendant is not entitled to attorneys' fees unless we determine that the plaintiff's claim was frivolous, unreasonable, or groundless." *Marquart*, 26 F.3d at 848 (citations omitted). Thus, "more rigorous standards apply for fee awards to prevailing defendants than to prevailing plaintiffs in Title VII cases." *Id.* (quotation and citation omitted). Only in "very narrow circumstances" is a

prevailing defendant entitled to an attorneys' fee award. *Id.* (quotation and citations omitted). "[A] court may not award attorneys' fees solely because the plaintiff did not prevail." *Id.* (citation omitted).

In announcing the "frivolous, unreasonable, or groundless" standard, *Christiansburg* did not address a scenario "involving multiple claims for relief that implicate a mix of legal theories and have different merits." *Fox*, 131 S. Ct. at 2213. "Some claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis. In short, litigation is messy, and courts must deal with this untidiness in awarding fees." *Id.* at 2213–14. The Supreme Court addressed the multiple-claim scenario in *Fox*, holding "that a court may grant reasonable fees to the defendant [where the plaintiff asserts both frivolous and nonfrivolous claims], but only for costs that the defendant would not have incurred but for the frivolous claims." *Id.* at 2211. The Court explained that "a defendant may deserve fees even if not all the plaintiff's claims were frivolous"; the defendant is entitled to relief for "expenses attributable to frivolous charges." *Id.* at 2214. The defendant's entitlement to relief "remains true when the plaintiff's suit also includes non-frivolous claims." *Id.* While a defendant "is not entitled to any fees arising from these non-frivolous charges," "the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed." *Id.* (citation omitted).

Pursuant to *Fox*, "a court may reimburse a defendant for costs under [§ 2000e–5(k)] even if a

plaintiff's suit is not wholly frivolous." *Id.* "Fee-shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees." *Id.* The core issue is "what work ... the defendant [may] receive fees for" when the "lawsuit involve[s] a mix of frivolous and non-frivolous claims." *Id.* "[A] defendant may not obtain compensation for work unrelated to a frivolous claim." *Id.* But a "defendant may receive reasonable fees for work related exclusively to a frivolous claim." *Id.* As to "work that helps defend against non-frivolous and frivolous claims alike—for example, a deposition eliciting facts relevant to both allegations," *id.*, the Court in *Fox* held that "a defendant may recover the reasonable attorney's fees he expended solely because of the frivolous allegations. And that is all." *Id.* at 2218. The district court is prohibited from awarding the defendant "compensation for any fees that he would have paid in the absence of the frivolous claims." *Id.*

As in *Fox*, this is a multiple-claims case involving at least one non-frivolous claim (Starke's claim). To properly apply the *Christiansburg–Fox* standard, we must first know why the district court concluded that a particular claim was frivolous, unreasonable, or groundless. *See Christiansburg*, 434 U.S. at 422, 98 S. Ct. 694. This is because, in a multiple-claims case, "[s]ome claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis." *Fox*, 131 S. Ct. at 2213–14. Second, if the district court concludes that "the plaintiff asserted both frivolous and non-frivolous claims," then

the court may award attorneys' fees "only for costs that the defendant would not have incurred but for the frivolous claims." *Id.* at 2211.

Here, the district court did not make particularized findings of frivolousness, unreasonableness, or groundlessness as to each individual claim upon which it granted summary judgment on the merits to CRST. The district court did not discuss specific claimants, choosing instead to make a universal finding that all of the EEOC's claims were without foundation. More problematic for our review is that the district court included in this universal finding claims for which we now find that CRST is not entitled to attorneys' fees—(1) the purported pattern-or-practice claim and (2) the claims dismissed for the EEOC's failure to satisfy its presuit obligations.

While we recognize that it is an arduous task, the *Christiansburg* standard requires the district court to make findings as to why a particular "claim was frivolous, unreasonable, or groundless." 434 U.S. at 422, 98 S. Ct. 694. Here, the district court did not make these particularized findings. Therefore, we necessarily remand to the district court to identify those claims dismissed because they were frivolous, unreasonable, or groundless. Because CRST *did not* prevail on Starke's non-frivolous claim, on remand, if the court concludes that a frivolous claim or claims exists, then it must necessarily apply the *Fox* standard to determine what fees, if any, CRST "expended solely because of the frivolous allegations." *Fox*, 131 S. Ct. at 2218.

4. Appellate Costs

Finally, the EEOC argues that the district court erred in awarding CRST its fees on appeal. First, it asserts that CRST should have filed its motion for appellate fees with this court, not the district court. Second, it contends that the district court failed to offer any explanation to support such an award.

Eighth Circuit Rule 47C governs motions for appellate fees and provides:

> (a) Motion for Fees. A motion for attorney fees, with proof of service, must be filed with the clerk within 14 days after the entry of judgment. The party against whom an award of fees is sought must file objections to an allowance of fees within 7 days after service. The court may grant on its own motion an allowance of reasonable attorney fees to a prevailing party.
>
> (b) Determination of Fees. On the court's own motion or at the request of the prevailing party, a motion for attorney fees may be remanded to the district court or administrative agency for appropriate hearing and determination.
>
> (c) Mandate. The clerk will prepare and certify an award of attorney fees granted by the court for insertion in the mandate. Issuance of a mandate will not be delayed for an award of attorney fees. If a mandate issues before final determination of a motion for attorney fees, the clerk of the district court, on the request of the clerk of this court, will add the award and its amendments to the mandate.

> "The usual practice for awarding fees and costs ... is for this Court to fix the compensation for services rendered before it, and for the District Court to do so for services rendered before it." *Little Rock Sch. Dist. v. State of Ark.*, 127 F.3d 693, 696 (8th Cir. 1997) (citing *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 138 (8th Cir. 1982) (en banc)). The purpose of Rule 47C is to permit "the court most familiar with the legal services in question" to make the fee award. *Id.*

But "Rule 47C cannot and does not affect the jurisdiction of the district courts." *Id.* Despite our local rule, "the district courts retain jurisdiction to decide attorneys' fees issues that we have not ourselves undertaken to decide." *Id.* "[D]iscretionary and practical considerations continue to be relevant to a district court's decision whether to grant a motion for attorneys' fees for services before an appellate court." *Id.* at 697. Rule 47C "is not a rigid jurisdictional rule." *Id.* It permits us "to grant attorneys' fees on [our] own motion" and exercise our "discretion to remand the question to the District Court, instead of determining the award [ourselves]." *Id.* (citing 8th Cir. R. 47C(a)-(b)). "The Rule thus preserves multiple procedural options for the determination of attorneys' fees." *Id.* Whether the district court or this court determines the appellate-fee award, the goal is the same: "calculation of a fair award." *Id.*

Although the district court in this case had the power to grant an attorneys' fees award, it could only do so after finding that the EEOC's "appeal was frivolous, unreasonable[,] or without foundation."

Barket, Levy, & Fine, Inc. v. St. Louis Thermal Energy Corp., 21 F.3d 237, 243 (8th Cir. 1994). "To find the appeal unreasonable, we must conclude that no reasonable person would have thought he could succeed on appeal; to find the appeal unfounded, we must conclude that the appeal had no foundation in law upon which the appeal could be brought." *Wrenn v. Gould*, 808 F.2d 493, 504 (6th Cir. 1987). "Although a district court's determination that the plaintiff's original action was frivolous or meritless may be probative of the efficacy of the appeal, such a determination is neither necessary nor sufficient to support an appellate award." *Bugg v. Int'l Union of Allied Indus. Workers of Am., Local 507 AFL–CIO*, 674 F.2d 595, 600 n.10 (7th Cir. 1982).

Here, the district court made no particularized findings as to why the EEOC's appeal to this court was frivolous, unreasonable, or without foundation; instead, it found only that "CRST is the prevailing party and that the *Christiansburg* standard is satisfied as to all of the claims that the EEOC appealed, other than the claim on behalf of Starke." *CRST III*, 2013 WL 3984478, at *19. The district court's conclusion that the EEOC's original action was frivolous, unreasonable, or groundless is insufficient to support an appellate award. *See Bugg*, 674 F.2d at 600 n.10. Furthermore, we have already concluded that the district court must make particularized findings on remand as to why it considers individual claims frivolous, unreasonable, or groundless. Therefore, we remand to the district court to consider anew whether CRST is entitled to an award of appellate fees. The district court must explain why "no reasonable person would have thought he could

succeed on appeal" or why "the appeal had no foundation in law." *Wrenn*, 808 F.2d at 504.

III. Conclusion

The present litigation has become what the Supreme Court cautioned against in *Fox*—"a second major litigation" over the attorneys' fees award. 131 S. Ct. at 2216. Nonetheless, remand is required in the present case for a reassessment of whether CRST is entitled to fees. In summary, we conclude that CRST is not entitled to an award of attorneys' fees for (1) claims that the district court dismissed based on the EEOC's failure to satisfy its presuit obligations and (2) the purported pattern-or-practice claim. On remand, the district court must individually assess each of the claims for which it granted summary judgment to CRST on the merits and explain why it deems a particular claim to be frivolous, unreasonable, or groundless. Because CRST *did not* prevail on Starke's non-frivolous claim, on remand, if the court concludes that a frivolous claim or claims exists, then it must necessarily apply the *Fox* standard to determine what fees, if any, CRST "expended solely because of the frivolous allegations." *Id.* at 2218. Thereafter, the district court must consider anew whether CRST is entitled to an award of appellate fees and explain why "no reasonable person would have thought he could succeed on appeal" or why "the appeal had no foundation in law." *Wrenn*, 808 F.2d at 504.

Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

Appendix B

United States District Court
N.D. Iowa
Cedar Rapids Division

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

CRST VAN EXPEDITED, INC., Defendant.
No. 07–CV–95–LRR.
Aug. 1, 2013.

ORDER

LINDA R. READE, Chief Judge.

I. INTRODUCTION

The matters before the court are Defendant CRST Van Expedited, Inc.'s ("CRST") "Bill of Costs" (docket no. 384) and "Motion for an Award of Its Reasonable Attorney[s'] Fees and Out–of–Pocket Expenses Pursuant to 42 U.S.C. § 2000e–5(k)" ("Motion for Attorneys' Fees") (docket no. 386).

II. RELEVANT PROCEDURAL HISTORY[1]

A. Underlying Action

1. Complaint

On September 27, 2007, the EEOC filed the instant lawsuit on behalf of Monika Starke "and a class of similarly situated female employees of [CRST]." Original Complaint at 1. Pursuant to Section 706 of Title VII, 42 U.S.C. § 2000e–5, the EEOC brought suit in its own name "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Starke] and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." First Amended Complaint ("Complaint") (docket no. 8) at 1.[2] The EEOC generally alleged that Starke and the other similarly situated women "were adversely affected ... when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working

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[1] For purposes of the instant Order, the court finds it appropriate to provide only an abbreviated history of the case, beginning with the Equal Employment Opportunity Commission's ("EEOC") Original Complaint (docket no. 2) filed on September 27, 2007. A history of the administrative proceedings preceding the Original Complaint is included in the court's August 13, 2009 Order (docket no. 263) at 2–15. A more detailed procedural history and factual background is set forth in *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 665–71 (8th Cir. 2012).

[2] The Complaint, filed on November 16, 2007, corrected a typographical error in the Original Complaint filed on September 27, 2007. *See* April 7, 2008 Order (docket no. 31) at 1 n.1.

environment based on their gender, and CRST failed to prevent, correct, and protect them." *Id.*

The heart of the Complaint contains the following specific allegations against CRST:

> 7. Since at least July 2005, CRST engaged in unlawful employment practices in violation of Sections 703(a) and 704(a) of Title VII, 42 U.S.C. §§ 2000e–2 and 2000e–3. Among other things, two of its lead drivers subjected Starke to sexual harassment during their supervision of [her] (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect Starke from the harassment and the hostile work environment, culminating in her discharge from employment with CRST.
>
> 8. Other similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST, including among other things, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers. CRST is liable for harm caused by the harassment and the hostile and

> offensive work environment because of the actions of its lead drivers or team drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect its female employees from the harassment and the hostile environment.
>
> 9. The effect of the practices complained of in Paragraphs 7 and 8 above has been to deprive Starke and a class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

Id. at 2–3. The EEOC further alleged that CRST's actions "were intentional" and "done with malice or with reckless indifference to the federally protected rights of Starke and the class of similarly situated female employees." *Id.* at 3.

In the Complaint, the EEOC asked the court for "a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment [and] any other employment practice which discriminates on the basis of sex." *Id.* at 4. The EEOC further asked the court to "[o]rder CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices." *Id.* Finally, the EEOC asked the court to order CRST to pay Starke and the similarly situated female employees compensatory damages, punitive damages and ordinary costs. *Id.*

On November 30, 2007, CRST filed an Answer (docket no. 11), which denied the allegations in the Complaint and asserted affirmative defenses. On May 1, 2008, CRST filed an Amended Answer (docket no. 36).

2. The "moving target"

On February 8, 2008, the court entered a Scheduling Order and Discovery Plan (docket no. 21), setting forth discovery deadlines and establishing a trial ready date of May 15, 2009. By August 2008, the EEOC had still not identified the total number of individuals included in the "class of similarly situated female employees," Complaint at 1, on behalf of whom it sought relief. On August 7, 2008, the EEOC requested that the court modify the Scheduling Order and Discovery Plan to extend the deadline for identifying medical or psychological expert witnesses. EEOC's Motion to Modify Scheduling Order (docket no. 37). The following day, CRST responded to the EEOC's request, expressing concern that the EEOC had "proposed [no] end date for its identification of class members" and requesting that the court establish a deadline. CRST's Response to EEOC's Motion to Modify Scheduling Order (docket no. 38) at 3. On August 18, 2008, the EEOC replied with a proposed deadline of December 7, 2008, noting that "[t]his is an EEOC pattern-or-practice class action," that it had so far identified "49 class members" and that it expected "that the total class [would] reach between 100 and 150 individuals." EEOC's Response to CRST's Request for Class Member Identification Deadline (docket no. 42) at 1–2. On August 20, 2008, the court established a

deadline of October 15, 2008, for the EEOC to disclose the individuals included in the "class." August 20, 2008 Order (docket no. 44) at 3.

On or before October 15, 2008, the EEOC identified approximately 270 allegedly aggrieved individuals.[3] On November 6, 2008, CRST filed the Motion for an Order to Show Cause, in which CRST opined that the EEOC's disclosures included individuals who had not affirmatively agreed to participate in the lawsuit and individuals the EEOC did not have a good-faith reason to believe were victims of actionable sex discrimination.

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[3] The number of allegedly aggrieved individuals varied considerably between October 15, 2008, and May 12, 2009. *See* CRST's Motion Under Rule 16(f) for an Order to Show Cause Concerning the EEOC's Identification of Class Members ("Motion for an Order to Show Cause") (docket no. 56) at 2 n.1 (noting that the EEOC's disclosures contained a total of 293 names but that communications with the EEOC's counsel indicated there were 275 allegedly aggrieved individuals); EEOC's November 21, 2008 Corrected List of Class Members (docket no. 68) (listing 274 allegedly aggrieved individuals); EEOC's December 11, 2008 Updated List of Class Members (docket no. 85) (listing 270 allegedly aggrieved individuals); EEOC's January 13, 2009 Updated List of Class Members (docket no. 111) (listing 263 allegedly aggrieved individuals); EEOC's January 22, 2009 Updated List of Class Members (docket no. 121) (listing 253 allegedly aggrieved individuals); EEOC's March 11, 2009 Updated List of Class Members (docket no. 159) (listing 254 allegedly aggrieved individuals, 156 of whom the EEOC was still pursuing relief on behalf of); EEOC's May 12, 2009 Updated List of Class Members (docket no. 224) (listing 255 allegedly aggrieved individuals, 146 of whom the EEOC was still pursuing relief on behalf of). The EEOC's filings subsequent to May 12, 2009, consistently refer to 255 allegedly aggrieved individuals.

Thus, CRST requested that the court strike those categories of allegedly aggrieved individuals.

On November 19, 2008, the court denied CRST's Motion for an Order to Show Cause. November 19, 2008 Order (docket no. 66) at 7–8. Specifically, the court accepted the EEOC's representation that "it had a good-faith belief that each and every one of the approximately 270 women disclosed to CRST [had] an actionable claim for sex discrimination." *Id.* at 8. The court, however, warned the EEOC that, "[i]f during the course of discovery CRST discover[ed] evidence that shed[ ] doubt on the EEOC's representations to the court, CRST [could] file an appropriate motion." *Id.* The court also expressed concern that "CRST might unfairly face a 'moving target' of prospective plaintiffs" and, consequently, the court ordered the EEOC to: (1) immediately file with the court a corrected list of the approximately 270 individuals it disclosed as of October 15, 2008; (2) make all individuals on such list available to CRST for a deposition before the conclusion of discovery on January 15, 2009; and (3) update the allegedly aggrieved individual list as necessary. *Id.* at 8–9.

Although the EEOC complied with the court's directive and filed updated and corrected lists of allegedly aggrieved individuals, it failed to make all of the identified individuals available for deposition before January 15, 2009. Accordingly, on February 19, 2009, consistent with its November 19, 2008 Order, the court barred the EEOC from pursuing relief for any individual not made available for deposition before the deadline. February 19, 2009 Order (docket no. 153). On

March 11, 2009, the EEOC filed an Updated List of Class Members, which listed 155 allegedly aggrieved individuals for whom the EEOC was still pursuing relief and 99 individuals who the EEOC alleged were sexually harassed but for whom the EEOC was not pursuing relief based on the court's February 19, 2009 Order.[4] On April 16, 2009, the court entered an Order (docket no. 193), which further precluded the EEOC from offering evidence related to the 99 individuals who the EEOC had not produced for deposition.

3. Summary judgment rulings

Between April 30, 2009, and August 13, 2009, the court ruled on CRST's various motions for summary judgment. First, on April 30, 2009, the court granted CRST's "Motion for Summary Judgment on [the] EEOC's Pattern and Practice Claim" (docket no. 150). April 30, 2009 Order (docket no. 197) at 67. Specifically, the court held that, to the extent the EEOC asserted a pattern or practice claim, such claim was dismissed with prejudice and, consequently, CRST was liable only

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[4] The March 11, 2009 Updated List of Class Members actually listed 156 individuals for whom the EEOC was still pursuing relief and 98 individuals for whom the EEOC was no longer pursuing relief. The EEOC later noted that the list erroneously included Karen Shank as an individual for whom the EEOC sought individual relief despite the fact that Shank was not offered for deposition. *See* EEOC's Response to CRST's Motion to Strike (docket no. 187) at 2 n.2. Accordingly, as of March 11, 2009, there were in fact 99 individuals on the list that CRST had not offered for deposition. However, as the court explains in note 6, *infra*, the EEOC removed one of those individuals, Lori Essig, from its subsequent Updated Lists of Class Members. Thus, out of the final 255 claims, 98 were dismissed as a discovery sanction.

to the extent the EEOC could prove individual claims of sexual harassment. *Id.*

Second, on May 11, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Based on Statute of Limitations and Other Grounds" (docket no. 147). May 11, 2009 Order (docket no. 223) at 25. In the May 11, 2009 Order, the court found that the applicable statute of limitations barred the EEOC from seeking relief on behalf of 9 individuals and barred, in part, the EEOC from seeking relief on behalf of another 3 individuals. *Id.* at 25–26.

Third, on May 13, 2009, the court granted CRST's "Motion for Summary Judgment Based on Judicial Estoppel" (docket no. 144). May 13, 2009 Order (docket no. 225) at 14. Specifically, the court found that 3 individuals, including Starke, were judicially estopped from seeking relief from CRST and, furthermore, the EEOC was also barred from seeking relief on their behalf. *Id.*

Fourth, on June 2, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Against the Claims of Certain of the Interveners" (docket no. 145). June 2, 2009 Order (docket no. 249) at 38–39.[5] Specifically, the court concluded that Janet Boot's claims were "frivolous,"

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[5] On September 26, 2008, the court granted Janet Boot, Barbara Grant, Cindy Moffett, Remcey Jeunenne Peeples, Starke and Latetsha Thomas's request to intervene. September 26, 2008 Order (docket no. 48) at 7. Because CRST does not request fees or costs from any of these individuals, the court omits the procedural history relating to these Plaintiffs–Interveners.

finding that her claims were barred by the court's previous rulings and, even if they were not, she failed to generate a genuine issue of material fact as to CRST's knowledge of the alleged harassment and failure to take proper remedial action. *Id.* at 17–18. The court also dismissed Remcey Jeunenne Peeples's claims and Nicole Cinquemano's sexual harassment claims, finding that CRST did not have actual or constructive knowledge of the alleged harassment. *Id.* at 23–24, 29. The court further held that the EEOC was barred from seeking relief at trial to the same extent these Plaintiffs–Interveners were barred. *Id.* at 39.

Fifth, on June 18, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Based on Class Members' Failure to Report the Alleged Harassment and/or CRST's Prompt and Effective Response to Reported Harassment" (docket no. 146). June 18, 2009 Order (docket no. 251) at 13. In its June 18, 2009 Order, the court found that the EEOC was barred from seeking relief on behalf of 11 individuals because CRST did not know or have reason to know that they were sexually harassed and 4 individuals because CRST adequately addressed the sexual harassment.

Sixth, on July 6, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Against Class Members Who Did Not Experience Severe or Pervasive Sexual Harassment" (docket no. 148). July 6, 2009 Order (docket no. 256) at 14. Specifically, in its July 6, 2009 Order, the court found that the EEOC had failed to generate a genuine issue of material fact as to whether 11 individuals had

experienced severe or pervasive sexual harassment and, consequently, held that the EEOC was barred from seeking relief on their behalf.

Seventh, on July 9, 2009, the court granted in part and denied in part CRST's "Motion for Summary Judgment Against Class Members Whose Claims Fail on Two or More Grounds" (docket no. 149). July 9, 2009 Order (docket no. 258) at 7. In the July 9, 2009 Order, the court barred the EEOC from seeking relief on behalf of 46 individuals. Specifically, the EEOC conceded that, in light of the court's April 30, 2009 Order dismissing any pattern or practice claim, 4 individuals did not suffer actionable sexual harassment and, accordingly, the court barred the EEOC from seeking relief on behalf of those individuals. The court further found that a reasonable jury could not find 42 individuals suffered from actionable sexual harassment because they did not suffer severe or pervasive sexual harassment and/or there was insufficient evidence to show that CRST knew or should have known that the individuals suffered sexual harassment yet failed to take proper remedial action.

Finally, on August 13, 2009, the court found that the EEOC was barred from seeking relief on behalf of the remaining 67 allegedly aggrieved individuals. August 13, 2009 Order at 39–40. Specifically, the court found that the EEOC "wholly abandoned its statutory duties" as to the remaining 67 allegedly aggrieved individuals because it: (1) failed to investigate such individuals' claims until after the EEOC filed the Complaint; (2) failed to include those individuals as members in the Letter of Determination's "class" until after the EEOC

filed the Complaint; (3) failed to make a reasonable cause determination as to the specific allegations of any of the 67 allegedly aggrieved individuals; and (4) did not attempt to conciliate the specific allegations of the 67 allegedly aggrieved individuals prior to filing the Complaint. *Id.* at 31–32. The court concluded that "dismissal [was] a severe but appropriate remedy." *Id.* at 38.

Thus, in light of the court's findings in its August 13, 2009 Order and in its prior orders, the EEOC was barred from pursuing relief on behalf of all 255 allegedly aggrieved individuals the EEOC had identified and, consequently, the court dismissed the Complaint in its entirety.[6] *Id.* at 40. The court further

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[6] Following the court's August 13, 2009 Order, the EEOC was barred from pursuing relief on behalf of: (1) 98 individuals as a discovery sanction, *see* February 19, 2009 Order and April 16, 2009 Order; (2) 9 individuals because of the applicable statute of limitations, *see* May 11, 2009 Order; (3) 3 individuals because of the doctrine of judicial estoppel, *see* May 13, 2009 Order; (4) 3 individuals because their claims were barred by the court's prior rulings or because the EEOC failed to generate a genuine issue of material fact as to CRST's knowledge of the alleged harassment and failure to take proper remedial action, *see* June 2, 2009 Order; (5) 15 individuals because they failed to report the alleged harassment and/or CRST promptly and effectively responded to the reported harassment, *see* June 18, 2009 Order; (6) 11 individuals because the EEOC failed to generate a genuine issue of material fact as to whether such individuals experienced severe or pervasive sexual harassment, *see* July 6, 2009 Order; (7) 46 individuals because they did not suffer severe or pervasive sexual harassment and/or there was insufficient evidence to show that CRST knew or should have known that the individuals suffered sexual harassment yet failed to take proper remedial action, *see* July 9, 2009 Order; and (8) 67 individuals because the EEOC failed

ordered the EEOC to pay CRST's ordinary costs, which CRST could request 10 days after disposition of the entire case. *Id.* Finally, the court determined that CRST was a "prevailing party" as to the EEOC and, pursuant to 42 U.S.C. § 2000e–5(k), CRST could seek attorneys' fees from the EEOC within 20 days after disposition of the entire case. *Id.*

In accordance with the court's August 13, 2009 Order, the Clerk of Court entered a Judgment (docket no. 279) on October 1, 2009, finding the EEOC "takes

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to investigate, issue a reasonable cause determination and conciliate their claims, *see* August 13, 2009 Order. Furthermore, the EEOC withdrew its claim on behalf of one individual, Gwen Allen. *See* EEOC's May 22, 2009 Updated List of Class Members (docket no. 237) at 1 n.1 (noting that the EEOC "removed Gwen Allen from the list of class members for whom it seeks relief" because "she requested that [the] EEOC no longer seek relief on her behalf"). Finally, two other individuals, Susan Guy and Sarah Ragland, inexplicably appeared on the EEOC's May 12, 2009 Updated List of Class Members as allegedly aggrieved individuals for whom the EEOC was not seeking relief, although these two individuals did not appear on the EEOC's March 11, 2009 Updated List of Class Members.

> The court further notes that, although the court referenced 99 individuals in its April 16, 2009 Order barring the EEOC from pursuing relief on behalf of those individuals it failed to produce for deposition, the EEOC removed one of those individuals, Lori Essig, from its subsequent Updated Lists of Class Members.
>
> Thus, by August 13, 2009, the claims of all 255 allegedly aggrieved individuals for whom the EEOC sought relief had either been dismissed by the court or withdrawn by the EEOC.

nothing and this action is dismissed." October 1, 2009 Judgment at 1.

4. Original cost and fee determination

On October 16, 2009, CRST filed a Bill of Costs (docket no. 280) pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920, and, on October 30, 2009, CRST filed a "Motion for Attorneys' Fees and Costs" (docket no. 282) pursuant to 42 U.S.C. § 2000e–5(k). After receiving extensive briefing on the issues, the court awarded CRST $92,842.21 in costs, $4,004,371.65 in attorneys' fees and $463,071.25 in out-of-pocket expenses, for a total of $4,560,285.11. February 9, 2010 Order (docket no. 320) at 39; *see also* February 9, 2010 Judgment (docket no. 321).

B. Appeal

The EEOC appealed the court's dismissal of 107 of its individual claims, and, on May 8, 2012, the Eighth Circuit Court of Appeals affirmed in part, reversed in part and remanded the case to this court for further proceedings. *See CRST*, 679 F.3d at 695. Specifically, the Eighth Circuit Court of Appeals reversed the court's grant of summary judgment on the EEOC's claim on behalf of Starke, finding that the EEOC was not judicially estopped from pursuing relief on behalf of Starke. *Id.* at 682, 695. Furthermore, the Eighth Circuit Court of Appeals reversed the court's grant of summary judgment on the EEOC's claim on behalf of Tillie Jones, finding that the EEOC produced sufficient evidence to create a genuine issue of material fact as to the severity or pervasiveness of the harassment that Jones allegedly suffered. *Id.* at 687–88, 695. The Eighth

Circuit Court of Appeals further vacated, without prejudice, the court's award of attorneys' fees because, "in light of [its] rulings, CRST [was] no longer a 'prevailing' defendant" under 42 U.S.C. § 2000e–5(k). *Id.* at 694–95. Judge Murphy concurred in part and dissented in part. *Id.* at 695–98.

C. History on Remand

On September 17, 2012, the formal Mandate (docket no. 345) issued and the case returned to this court for further proceedings on the EEOC's claims on behalf of Starke and Jones. On October 11, 2012, the EEOC withdrew its claim on behalf of Jones, explaining that the "law of the case" precluded the EEOC from seeking relief on her behalf because it had not exhausted Title VII's administrative prerequisites as to her claim. Notice of Withdrawal of Claim for Tillie Jones (docket no. 360) at 1.

On February 8, 2013, CRST and the EEOC filed a joint "Motion for Entry of Order of Dismissal" (docket no. 379), in which the parties stated:

> Dismissal is required by (a) the Eighth Circuit [Court of Appeals'] affirmance, with the exception of [the] EEOC's claims on behalf of ... Jones and ... Starke, of this [c]ourt's October 1, 2009 Judgment; (b) [the] EEOC's withdrawal on October 11, 2012, of its claim on behalf of ... Jones on the ground that it was barred by this [c]ourt's Order of August 13, 2009; and (c) [the] EEOC's and CRST's settlement of [the] EEOC's claim on behalf of ... Starke pursuant to the Settlement Agreement attached to this motion as Exhibit 1.

> Therefore, all of [the] EEOC's claims have now been resolved.

Motion for Entry of Order of Dismissal at 1 (citation omitted). In the attached Settlement Agreement (docket no. 379–1), CRST agreed to pay $50,000 in settlement of the EEOC's claim on behalf of Starke. The Settlement Agreement further provided:

> 4. This Agreement does not preclude CRST from pursuing attorney[s'] fees and costs pursuant to the Order of the Eighth Circuit [Court of Appeals] dated May 8, 2012.
>
> 5. Further, this Agreement does not preclude either [the] EEOC or CRST from making any arguments relating to CRST's pursuit of attorney[s'] fees and costs, including arguments relating to whether [the] EEOC or CRST is the prevailing party.

Settlement Agreement at 2. On February 8, 2013, the court dismissed the case with prejudice. February 8, 2013 Order (docket no. 380). That same date, the Clerk of Court entered a Judgment (docket no. 381) in accordance with the court's February 8, 2013 Order.

D. Bill of Costs and Motion for Attorneys' Fees

On March 18, 2013, CRST filed the Bill of Costs and the Motion for Attorneys' Fees. On April 15, 2013, the EEOC filed a Resistance to CRST's Bill of Costs ("Resistance to the Bill of Costs") (docket no. 388), and, on April 16, 2013, the EEOC filed a Resistance to CRST's Motion for Attorneys' Fees ("Resistance to the Motion for Attorneys' Fees") (docket no. 391). On April

30, 2013, CRST filed a Reply to the EEOC's Resistance to the Bill of Costs and Resistance to the Motion for Attorneys' Fees ("CRST's Reply") (docket no. 394). On May 7, 2013, the EEOC filed a Sur–Reply ("EEOC's Sur–Reply") (docket no. 397). Finally, on July 11, 2013, the parties jointly filed a Supplemental Authority (docket no. 398), which attached the United States Supreme Court's recent decision in *Vance v. Ball State University*, 131 S. Ct. 2434 (2013).

Neither party requests oral argument on the Bill of Costs or the Motion for Attorneys' Fees, and the court finds that a hearing is unnecessary. The Bill of Costs and the Motion for Attorneys' Fees are fully submitted and ready for decision.

III. MOTION FOR ATTORNEYS' FEES

Title 42, United States Code, Section § 2000e–5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e–5(k). Thus, under the statute, only a "prevailing party" may request attorneys' fees and out-of-pocket expenses. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the United States Supreme Court set forth an additional requirement for prevailing defendants—that is, a prevailing defendant is only entitled to attorneys' fees and out-of-pocket

expenses when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. If this standard is satisfied, a court may award a prevailing defendant reasonable attorneys' fees and out-of-pocket expenses.

The court shall begin by determining whether CRST is a "prevailing party" within the meaning of 42 U.S.C. § 2000e–5(k). Because the court concludes that it is, the court then turns to consider whether the EEOC's action was frivolous, unreasonable or without foundation under *Christiansburg*. Finally, because the court concludes that the *Christiansburg* standard is met, the court shall turn to consider whether CRST's requested attorneys' fees and out-of-pocket expenses are reasonable.

A. Prevailing Party

1. Parties' arguments

In the Brief in Support of the Motion for Attorneys' Fees, CRST notes that the court previously determined that CRST was a prevailing party and awarded CRST its reasonable attorneys' fees and expenses. CRST contends that, following the Eighth Circuit Court of Appeals' decision and the remanded proceedings, it is still "the prevailing party as to all [of the] EEOC['s] claims except one claim on behalf of ... Starke." Brief in Support of the Motion for Attorneys' Fees (docket no. 386–1) at 12. CRST argues that, under *Fox v. Vice*, —U.S. ——, 131 S. Ct. 2205 (2011), a defendant need not prevail on all claims in order to qualify as a prevailing party. Rather, "[a] defendant is

entitled to an award of its reasonable fees as to all claims on which it prevailed provided those claims were not closely related to the claim or claims on which it did not prevail." Brief in Support of the Motion for Attorneys' Fees at 12. In this case, CRST contends that it prevailed on the EEOC's pattern-or-practice claim and prevailed on all of the EEOC's individual claims other than its claim on behalf of Starke. Accordingly, CRST maintains that, assuming it is able to satisfy the *Christiansburg* standard, it is entitled to an award of its attorneys' fees incurred in defending against all claims except the claim on behalf of Starke.

In its Resistance to the Motion for Attorneys' Fees, the EEOC contends that its success on Starke's claim makes it the prevailing party and, consequently, CRST is not entitled to any attorneys' fees. The EEOC points to the fact that the Eighth Circuit Court of Appeals "reversed the original fee award because, after the Eighth Circuit [Court of Appeals] ruled that [the] EEOC could proceed on behalf of ... Starke, CRST was no longer the prevailing party." Resistance to the Motion for Attorneys' Fees at 5. The EEOC maintains that, because the EEOC succeeded on its claim on behalf of Starke after the Eighth Circuit Court of Appeals remanded the case, CRST cannot be the prevailing party. Moreover, the EEOC notes that, under *Marquart v. Lodge 837, International Association of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994), a defendant is only a prevailing party when there has been a judicial determination that the plaintiff's claim lacks merit. In this case, the EEOC contends that the court's dismissal

of individual claims as a discovery sanction or due to the EEOC's failure to satisfy Title VII's administrative prerequisites for suit is not a judicial determination on the merits. Thus, the EEOC urges the court to find that CRST is not the prevailing party and, therefore, not entitled to its attorneys' fees and expenses.

2. Applicable law

In *Marquart*, the Eighth Circuit Court of Appeals articulated a standard for determining when a defendant is a prevailing party. *Marquart*, 26 F.3d 842. The Eighth Circuit Court of Appeals began by looking at the Supreme Court's analysis in *Christiansburg* and the "dual policy considerations underlying" 42 U.S.C. § 2000e–5(k)—that is, "[t]o discourage the litigation of frivolous, unreasonable, groundless, or vexatious claims, but without discouraging the rigorous enforcement of federal rights under Title VII." *Id.* at 849. In light of the United States Supreme Court's holding in *Christiansburg* that a prevailing defendant is entitled to attorneys' fees only when the plaintiff's claim is frivolous, unreasonable or groundless, the Eighth Circuit Court of Appeals concluded that a defendant is a prevailing party within the meaning of 42 U.S.C. § 2000e–5(k) only when there has been "a judicial determination of the plaintiff's case on the merits," such as an order granting a defendant's motion for summary judgment on the merits. *Id.* at 852.

Thus, a court may "grant prevailing party status to a Title VII defendant only in very narrow circumstances." *Id.* A plaintiff's voluntary dismissal of a case, for example, is generally not a judicial determination on the merits of the plaintiff's case. *Id.*

(finding that a voluntary dismissal is ordinarily not a judicial determination on the merits but suggesting that when a plaintiff voluntarily dismisses a complaint "to escape a disfavorable judicial determination on the merits," an award of attorneys' fees to the defendant may be warranted). Furthermore, the court's dismissal of a complaint for lack of subject matter jurisdiction is not a judicial determination on the merits of the plaintiff's case. *See Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990) ("Where a complaint has been dismissed for lack of subject matter jurisdiction, the '[d]efendant has not "prevailed" over the plaintiff on any issue central to the merits of the litigation.' " (alteration in original) (quoting *Sellers v. Local 1598*, 614 F. Supp. 141, 144 (E.D. Pa. 1985), *aff'd*, 810 F.2d 1164 (3d Cir. 1987))).

A defendant need not prevail on every claim in order to be entitled to attorneys' fees under 42 U.S.C. § 2000e–5(k). *See Fox*, 131 S. Ct. at 2214 ("Fee-shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees."). Rather, the United States Supreme Court has recognized that, in some situations, "a court could properly award fees to both parties-to the plaintiff, to reflect the fees he incurred in bringing the meritorious claim; and to the defendant, to compensate for the fees he paid in defending against the frivolous one." *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.10 (1983)). However, when a defendant is a prevailing party as to only some of the plaintiff's claims, the defendant may "receive only the portion of his

[attorneys'] fees that he would not have paid but for the frivolous claim[s]." *Id.* at 2215.

3. Discussion

In this case, the court previously determined that CRST was a prevailing party. *See* August 13, 2009 Order at 40 ("Now that CRST is a 'prevailing party' as to the EEOC, 42 U.S.C. § 2000e–5(k), CRST may file an application for attorneys' fees from the EEOC...."); February 9, 2010 Order at 12 (noting that the "court previously found that CRST is a 'prevailing party' as to the EEOC" and citing the August 13, 2009 Order). The question the court must now consider is whether the result of the proceedings on appeal and on remand changes the court's earlier conclusion.

a. Single claim versus multiple claims

The EEOC contends that this case was comprised of a single claim and that it won that claim. The court finds that this argument is without merit. It is difficult discern how a Complaint requesting relief on behalf of "Starke and a class of similarly situated female employees," Complaint at 1, under § 706 of Title VII contains only *one* claim. "[I]t is axiomatic that [under § 706] the EEOC stands in the shoes of ... aggrieved persons in the sense that it must prove all of the elements of their sexual harassment claims to obtain relief for them." April 30, 2009 Order at 18. Thus, the EEOC was required to prove the elements of a sexual harassment claim as to each individual to obtain relief on behalf of that individual. Given the way the EEOC drafted its Complaint, CRST—and the court, for that matter—did not know how many individuals the EEOC

was pursuing relief on behalf of until the litigation was well under way. But, on the face of the Complaint, it is clear that the EEOC sought relief on behalf of at least two individuals and, thus, there were at least two claims. By October 15, 2008, it became clear that the EEOC was asserting approximately 270 claims, although that number dropped to 255 by May 12, 2009. Thus, it is clear that this case contained multiple and distinct claims for relief.

Incidentally, the court notes that the EEOC's contention that this case had only one claim could lead to truly absurd results. As the court noted above, the first step in determining whether a party is entitled to attorneys' fees under 42 U.S.C. § 2000e–5(k) is to determine whether the party is a "prevailing party"—that is, the court does not reach the *Christiansburg* test unless it first finds that a defendant qualifies as a prevailing party. The EEOC, in essence, argues that, as long as it names one individual in a complaint and succeeds as to that individual, it can include as many frivolous allegations as it wishes in a complaint using the vague language "and a class of similarly situated individuals" without ever being liable for a defendant's attorneys' fees. Such a result clearly contravenes the congressional policy embodied in 42 U.S.C. § 2000e–5(k), as interpreted in *Christiansburg*. *See Christiansburg*, 434 U.S. at 420 (explaining that Congress enacted 42 U.S.C. § 2000e–5(k) "to clear the way for suits to be brought under [Title VII], [but] also ... to protect defendants from burdensome litigation having no legal or factual basis"). The EEOC cannot avoid liability for attorneys' fees simply by artfully

crafting a complaint using vague language to hide frivolous allegations.

Thus, the court concludes that the EEOC asserted multiple and distinct claims against CRST. The EEOC is correct that CRST did not prevail on one such claim.[7] However, under *Fox*, CRST need not prevail on every claim to be entitled to an award of attorneys' fees. Accordingly, the court next turns to consider whether there was a judicial determination on the merits in favor of CRST on each claim other than the claim on behalf of Starke.

b. Judicial determination on the merits

The EEOC argues that, "even if [it] were not the prevailing party for fee purposes, CRST would still not be a prevailing defendant, where a large portion of the claim was not determined on the merits." EEOC's Sur–Reply at 3. Specifically, while the EEOC acknowledges that "CRST defeated the claim on the merits for 83 women for whom it was granted summary judgment," the EEOC argues that "CRST won on

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[7] The parties argue at great length as to whether the EEOC is the prevailing party on the claim on behalf of Starke. *See* Resistance to the Motion for Attorneys' Fees at 13; CRST's Reply at 5–6; EEOC's Sur–Reply at 1–2. The court finds that it is unnecessary to address the parties' arguments on this issue. As the EEOC acknowledges in its Resistance to the Motion for Attorneys' Fees, it is not entitled to a fee award under 42 U.S.C. § 2000e–5(k). *See* Resistance to the Motion for Attorneys' Fees at 7 n.5 ("[The] EEOC does not, of course, seek fees for itself since § 2000e–5(k) allows for fees to prevailing parties 'other than the Commission or the United States.'" (quoting 42 U.S.C. § 2000e–5(k))). Thus, it is of no consequence whether the EEOC qualifies as a prevailing party.

reasons other than the merits as to [98] of the women who were never deposed, and as to 67 women for whom ... [the] EEOC failed to meet the statutory prerequisites for suit." *Id.* The EEOC's argument fails. As discussed above, the EEOC's characterization of this suit as a single claim is incorrect. Rather, the court must examine each claim to determine whether CRST received a judicial determination on the merits.

The court begins by looking at its April 30, 2009 Order dismissing with prejudice the EEOC's pattern-or-practice claim. The EEOC now contends that it never asserted a pattern-or-practice claim but, rather, intended to use a pattern-or-practice method of proof. For the reasons set forth in the court's April 30, 2009 Order, the court finds that CRST justifiably filed a motion for summary judgment on the pattern-or-practice claim given the confusion the EEOC created as to whether it was pursuing such a claim. *See* April 30, 2009 Order at 24–26. The court granted CRST's motion for summary judgment, finding "that the EEOC ... presented insufficient evidence to show that CRST ... engaged in a pattern or practice of tolerating sexual harassment of its female drivers." *Id.* at 57. This is a judicial determination on the merits in favor of CRST and, consequently, CRST is the prevailing party as to the EEOC's pattern-or-practice claim.

Following the court's dismissal of the EEOC's pattern-or-practice claim, the EEOC was required to prove each individual claim of sexual harassment. At that stage in the litigation, there were 154 allegedly aggrieved individuals remaining and, thus, CRST was

required to defend against 154 sexual harassment claims.[8] The court granted summary judgment in favor of CRST on each of the remaining 154 claims, and the Eighth Circuit Court of Appeals affirmed the court's grant of summary judgment as to each claim that the EEOC appealed, other than the claims on behalf of Starke and Jones.

While the EEOC acknowledges that the court granted summary judgment on the merits on some of those 154 claims, the EEOC contends that the court's dismissal of claims due to the EEOC's failure to satisfy the Title VII administrative prerequisites is not a judicial determination on the merits. The court disagrees. When it is the EEOC, as opposed to an individual, bringing suit, Title VII imposes an additional element of a claim to relief. That is, in addition to proving the usual elements of a sexual

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[8] As the court previously noted, the EEOC initially identified approximately 270 individuals. That number varied considerably over the months until May 12, 2009, when the EEOC began to consistently refer to 255 allegedly aggrieved individuals. *See* May 12, 2009 Updated List of Class Members. Of those 255 individuals, the EEOC was barred from seeking relief on behalf of 98 as a discovery sanction. The EEOC, apparently, voluntarily withdrew its claims on behalf of 3 of the remaining individuals. *See supra* note 6 (noting that the EEOC voluntarily removed Gwen Allen's name from the list of individuals it was still seeking relief on behalf of and further noting that two other individuals, Susan Guy and Sarah Ragland, inexplicably appeared on the list of allegedly aggrieved individuals for whom the EEOC was no longer seeking relief). Thus, there was no judicial determination on the merits as to those 101 claims. CRST's various motions for summary judgment addressed the remaining 154 individuals.

harassment claim, the EEOC must also establish that it pursued an administrative resolution. This is not a jurisdictional prerequisite; rather, it is an ingredient of the EEOC's claim. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (holding that Title VII's employee-numerosity requirement "is an element of a plaintiff's claim for relief, not a jurisdictional issue"); *EEOC v. Argo Distrib., LLC*, 555 F.3d 462, 469 (5th Cir. 2009) ("[T]he EEOC's conciliation requirement is a precondition to suit but not a jurisdictional prerequisite."). Thus, the court's dismissal of claims due to the EEOC's failure to satisfy its pre-suit obligations is a dismissal on the merits of the EEOC's claims.

Finally, although the EEOC did not raise the issue, the court finds it appropriate to discuss whether CRST is a prevailing party as to Jones's claim. The Eighth Circuit Court of Appeals reversed the court's finding that Jones was not subjected to severe or pervasive sexual harassment and, consequently, remanded the EEOC's claim on her behalf. On remand, the EEOC voluntarily withdrew its claim on behalf of Jones in accordance with the "law of the case"—that is, the EEOC acknowledged that it had not satisfied the Title VII administrative prerequisites as to that claim. *See* Notice of Withdrawal of Claim for Tillie Jones at 1 (noting that "the law of the case, specifically this [c]ourt's order of August 13, 2009 ..., bars its claim on behalf of ... Jones"). While *Marquart* held that a plaintiff's voluntary dismissal is generally not a judicial determination on the merits, the Eighth Circuit Court of Appeals suggested that a defendant may be considered a prevailing party when a plaintiff

voluntarily dismisses a claim to avoid an adverse judicial determination. *See Marquart*, 26 F.3d at 852. Here, had the EEOC not withdrawn its claim on behalf of Jones, the court would have dismissed it pursuant to its August 13, 2009 Order. Thus, the court concludes that CRST is a prevailing party as to the EEOC's claim on behalf of Jones.

c. Summary

In light of the foregoing, the court finds that CRST is the prevailing party on the EEOC's pattern-or-practice claim and 153 of the EEOC's individual claims. CRST is not the prevailing party on the EEOC's claim on behalf of Starke, the 98 claims the court dismissed as a discovery sanction or 3 of the claims the EEOC withdrew. Pursuant to *Christiansburg*, the court shall now turn to consider whether those claims on which CRST prevailed are frivolous, unreasonable or groundless.

B. Christiansburg Standard

1. Parties' arguments

In the Brief in Support of the Motion for Attorneys' Fees, CRST notes that the court previously found the *Christiansburg* standard was satisfied due to the EEOC's unreasonable failure to comply with Title VII's pre-suit obligations. CRST further notes that the Eighth Circuit Court of Appeals "affirmed without qualification" the court's dismissal of such claims. Brief in Support of the Motion for Attorneys' Fees at 14. Accordingly, CRST contends that the court's prior ruling still applies. CRST also contends that the *Christiansburg* standard is satisfied as to the EEOC's

other claims because, in the course of the underlying litigation, CRST "demonstrated that [the] EEOC did not have a prima facie basis for its pattern-or-practice claim or 75 % of its individual claims." *Id.* at 15.

In its Resistance to the Motion for Attorneys' Fees, the EEOC argues that the "landscape ... has changed considerably" since the court's original fee award. Resistance to the Motion for Attorneys' Fees at 9. Specifically, the EEOC contends that its position with regard to its pre-suit obligations cannot be considered "unreasonable" because Judge Murphy accepted the EEOC's position in her dissent. The EEOC maintains that, "[w]hen a dissent accepts a party's position on such a critical element of the case, the action cannot be considered unreasonable." *Id.* Moreover, the EEOC alleges that the Eighth Circuit Court of Appeals created a new rule when it held that the EEOC must investigate and attempt to conciliate "individual victims of a class claim." *Id.* at 10. The EEOC argues that, at the time it filed the lawsuit in this case, there was "long standing and consistent precedent" supporting its position that it need not investigate and attempt to conciliate each individual claim. *Id.* Even if the court were to find the EEOC's failure to satisfy its presuit obligations was unreasonable, the EEOC contends that CRST is only entitled to attorneys' fees incurred in defending against frivolous claims and, because this case is a "single claim of a hostile work environment [that cannot] be broken into separate 'claims,'" CRST is not entitled to any fees. *Id.* at 15. Finally, the EEOC maintains that it never asserted a

pattern-or-practice claim and the individual claims that it did assert had a "valid evidentiary basis." *Id.* at 17.

2. Applicable law

In interpreting 42 U.S.C. § 2000e–5(k), "the [United States] Supreme Court has distinguished between prevailing Title VII plaintiffs and prevailing Title VII defendants." *Marquart*, 26 F.3d at 848. A district court may award attorneys' fees to a prevailing plaintiff "'in all but very unusual circumstances.'" *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975)). However, an award of attorneys' fees to a prevailing defendant is appropriate in much more limited circumstances.

In *Christiansburg*, the United States Supreme Court outlined the principles that guide a district court's discretion when it decides whether to grant attorneys' fees to a prevailing defendant in a Title VII case. *Christiansburg*, 434 U.S. 412. The Court explained:

> [A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his [or her] action must have been unreasonable or without foundation. This

> kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Id. at 421–22; *see also Marquart*, 26 F.3d at 848 ("[A] court may not award attorneys' fees to a prevailing Title VII defendant unless the 'court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" (second alteration in original) (quoting *Christiansburg*, 434 U.S. at 422)). The Eighth Circuit Court of Appeals has explained that this standard is designed "[t]o discourage the litigation of frivolous, unreasonable, groundless, or vexatious claims, but without discouraging the rigorous enforcement of federal rights under Title VII." *Marquart*, 26 F.3d at 849. The burden is on a prevailing defendant to prove that the plaintiff's claim was frivolous, unreasonable or groundless. *Id.* at 851–52 (citing cases).

As suggested above, a defendant need not prove that each of the plaintiff's claims was frivolous, unreasonable or groundless. *See Fox*, 131 S. Ct. at 2214. As the United States Supreme Court explained in *Fox:*

> [Section 2000e–5(k)] serves to relieve a defendant of expenses attributable to frivolous charges. The plaintiff acted wrongly in leveling such allegations, and the court may shift to him the reasonable costs that those claims imposed on his adversary That remains true when the plaintiff's suit also includes nonfrivolous claims. The defendant, of course, is not entitled to any fees arising from these non-frivolous charges.

> But the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed.

Id. (citations omitted). Where a plaintiff brings both frivolous and non-frivolous claims, the defendant is entitled to attorneys' fees that would not have been incurred but for the frivolous claims. *Id.* at 2216 ("[T]he dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the costs would have been incurred in the absence of the frivolous allegation.").

3. Discussion

The court previously determined that the EEOC's claims were unreasonable, and, after reviewing the record and the parties' arguments, the court essentially stands by such determination. First, the court affirms its earlier conclusion that the EEOC's failure to exhaust Title VII's administrative prerequisites was unreasonable. *See* February 9, 2010 Order at 13–16. As CRST notes, the Eighth Circuit Court of Appeals "affirmed without qualification," Brief in Support of the Motion for Attorneys' Fees at 14, the court's August 19, 2009 Order dismissing 67 claims that the EEOC had not investigated and attempted to conciliate. *See CRST*, 679 F.3d at 672–77 (affirming the court's finding that "the EEOC wholly failed to satisfy its statutory pre-suit obligations"). Accordingly, the court stands by its earlier determination that "the EEOC's actions in pursuing this lawsuit were unreasonable, contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon CRST and the court."

February 9, 2010 Order at 16; *see Argo Distrib., LLC*, 555 F.3d at 469 ("The EEOC acts unreasonably in disregarding procedural requirements for suit, and attorneys' fees may be awarded."); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982) (upholding the district court's award of attorneys' fees under 42 U.S.C. § 2000e–5(k), citing the district court's finding that the "procedural and regulatory defects committed by the EEOC were clearly cognizable at an early stage in this litigation's history ... [and] [t]he EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness" (internal quotation mark omitted)); *cf. EEOC v. Trans States Airlines, Inc.*, 462 F.3d 987, 996 (8th Cir. 2006) (noting that, although it was "troubled by the EEOC's failure to adhere to its own deadline of June 20 before declaring that conciliation had failed," such failure was not unreasonable where "the parties agreed throughout negotiations that they were far apart on the terms of a settlement, and it [did] not appear that there was a reasonable prospect of settlement when the EEOC declared that conciliation efforts were unsuccessful").

Second, the court finds that the EEOC's pattern-or-practice claim was unreasonable. *See* April 30, 2009 Order at 57–67 (noting that the EEOC presented only anecdotal evidence in support of its pattern-or-practice claim, it did not present "any expert evidence, statistics or legal authority to support its argument that there is so much sexual harassment of CRST's female drivers that CRST must tolerate sexual harassment" and its "argument boils down to little more than ... bald assertions"). The remaining

claims that the court dismissed on summary judgment were likewise unreasonable or groundless.[9] In its Resistance to the Motion for Attorneys' Fees, the EEOC suggests that its position that Lead Drivers were supervisors was "sufficiently non-frivolous" that the United States Supreme Court granted certiorari on the issue of what constitutes a "supervisor." Resistance

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[9] The court notes that the August 13, 2009 Order finding that the EEOC failed to exhaust Title VII's administrative requirements only addressed the remaining 67 individuals in the suit. The court did not make a finding as to whether the EEOC reasonably investigated and attempted to conciliate the individual claims the court had already dismissed on summary judgment. On appeal, the Eighth Circuit Court of Appeals found that "the EEOC failed, as a matter of law, to investigate and/or conciliate its claims on behalf of" 4 additional individuals. *CRST*, 679 F.3d at 689. Thus, the court finds that these 71 claims were unreasonable.

In its Brief in Support of the Motion for Attorneys' Fees, CRST contends that the EEOC failed to satisfy its pre-suit obligations as to all of the claims other than the claims on behalf of Starke and Peeples. *See* Brief in Support of the Motion for Attorneys' Fees at 14 & n.7 (noting that CRST does not request fees incurred in defeating Peeples's claim). The EEOC does not respond to this contention in its Resistance to the Motion for Attorneys' Fees and, in earlier filings, it appears to concede that it did not investigate or attempt to conciliate claims other than those on behalf of Starke and Peeples. *See, e.g.*, Resistance to the Motion for an Order to Show Cause (docket no. 229) at 7 (noting that, at the time the EEOC attempted to conciliate, the only named aggrieved individuals were Starke and Peeples). To the extent the EEOC failed to reasonably investigate and conciliate any claims in addition to those identified by the court and the Eighth Circuit Court of Appeals, the court finds that such claims were unreasonable.

to the Motion for Attorneys' Fees at 18. The court disagrees. The law in the Eighth Circuit Court of Appeals was well-settled before the EEOC brought the instant action. *See CRST*, 679 F.3d at 684 ("Applying our precedent, we agree with the district court that CRST's Lead Driver is not a supervisory employee."); *see also* June 2, 2009 Order at 17 n.9 (noting that "[o]ther courts have uniformly held that truck driver trainers are coworkers and not supervisors"). Thus, given that the EEOC should have known that it would be required to prove that CRST had actual or constructive knowledge of the sexual harassment, many of its claims were groundless. For instance, the court summarily dismissed 6 individual claims because the individuals had "*never* informed CRST of the sexual harassment while they were working for CRST." June 18, 2009 Order at 7; *cf. EEOC v. Kenneth Balk & Assocs., Inc.*, 813 F.2d 197, 198 (8th Cir. 1987) (finding that the plaintiff's claim was not baseless given that the defendant had sought neither a pretrial dismissal nor summary judgment, had not moved for a directed verdict during the trial and "the district court directed the parties to submit post-trial briefs as well as proposed findings of fact and conclusions of law before taking the case under submission").

In sum, the court finds that the EEOC's pattern-or-practice claim and 153 of its individual claims were unreasonable or groundless and, consequently, the *Christiansburg* standard is satisfied as to these claims. Accordingly, the court shall turn to consider whether CRST's requested fees and expenses are reasonable.

C. Reasonable Fees and Out–of–Pocket Expenses

1. Parties' arguments

In its Brief in Support of the Motion for Attorneys' Fees, CRST argues that it is entitled to fees it incurred prior to the appeal and the fees incurred during the appeal. With regard to the fees incurred prior to the appeal, CRST contends that the court's earlier fee award remains reasonable after deducting fees incurred defending against the EEOC's claim on behalf of Starke. *See* Attachment J to the Motion for Attorneys' Fees (docket no. 386–15) (showing hours Jenner & Block ("Jenner") spent on the claim on behalf of Starke); Attachment L to the Motion for Attorneys' Fees (docket no. 386–17) (showing hours Simmons Perrine Moyer & Bergman ("Simmons") [10] spent on the claim on behalf of Starke). With regard to the fees incurred on appeal, CRST requests $1,072,014.67 if Jenner's hourly rates are used or $491,076.61 if local hourly rates are used. These figures reflect a 5% reduction for work spent on the claim on behalf of Starke. Finally, CRST requests the same out-of-pocket expenses that the court previously awarded CRST, "less the amount awarded by [the] [c]ourt for investigator fees in excess of the retainer payment

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[10] As CRST notes in the Brief in Support of the Motion for Attorneys' Fees, "Moyer & Bergman merged with Simmons Perrine to become Simmons Perrine Moyer Bergman on January 1, 2009." Brief in Support of the Motion for Attorneys' Fees at 27 n.17.

made by CRST." Brief in Support of the Motion for Attorneys' Fees at 34.

In its Resistance to the Motion for Attorneys' Fees, the EEOC advances five arguments regarding CRST's particular fee and expense requests. First, the EEOC contends that CRST is not a prevailing party as to the appeal and, even if it were, CRST has not shown that the *Christiansburg* standard is satisfied. Accordingly, the EEOC maintains that CRST is not entitled to any appellate fees. Second, the EEOC argues that CRST did not deduct all fees that relate to Starke's claim; specifically, the EEOC contends that CRST has not deducted "fees incurred in conducting legal research, writing and editing CRST's judicial estoppel summary judgment motion." Resistance to the Motion for Attorneys' Fees at 21. Third, the EEOC argues that CRST did not deduct "fees related to work on four intervening claims on which it did not prevail." *Id.* Fourth, the EEOC argues that CRST is entitled only to fees that it incurred defending against frivolous claims and "CRST's request for fees should be denied because it fails to distinguish for work that does not meet the *Christiansburg* standard." *Id.* at 22. Finally, the EEOC argues that CRST's documentation is insufficient; specifically, the EEOC alleges that CRST's invoices reflect "block billing," which "mak[es] it impossible to differentiate between the work CRST's attorneys performed on their losing motion, and work on other motions where CRST was successful." *Id.*

2. Applicable law

"'The starting point in determining [reasonable attorneys' fees] is the lodestar, which is calculated by

multiplying the number of hours reasonably expended by the reasonable hourly rates.'" *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005) (quoting *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 851 (8th Cir. 2002)). The lodestar figure is presumed to be the reasonable fee to which counsel is entitled. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 805 (8th Cir. 1993). "If the prevailing party did not achieve success on all claims, [the lodestar] may be reduced, taking into account the most critical factor, 'the degree of success obtained,' with discretion residing in the district court." *Simpson v. Merchs. & Planters Bank*, 441 F.3d 572, 580 (8th Cir. 2006) (quoting *Hensley*, 461 U.S. at 436–37).

The district court retains wide discretion in making a fee award. *See Hensley*, 461 U.S. at 437 ("We reemphasize that the district court has discretion in determining the amount of a fee award."). "This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* The district court must, however, "provide a concise but clear explanation of its reasons for the fee award." *Id.* "When an adjustment is requested on the basis of ... [the] limited nature of the relief obtained by the [prevailing party], the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Id.*

A reasonable hourly rate is generally the prevailing market rate in the locale—that is, the "ordinary rate for similar work in the community where the case has

been litigated." *Moysis v. DTG Datanet*, 278 F.3d 819, 828–29 (8th Cir. 2002) (quoting *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001)) (internal quotation mark omitted).

> To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). "A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate." *Id.*

The prevailing party must also proffer evidence of the number of hours reasonably expended on the litigation. *Hensley*, 461 U.S. at 433.

> Inadequate documentation may warrant a reduced fee.... Incomplete or imprecise billing records preclude any meaningful review by the district court of the fee application for "excessive, redundant, or otherwise unnecessary" hours and may make it impossible to attribute a particular attorney's specific time to a distinct issue or claim.

H.J. Inc. v. Flygt Corp., 925 F.2d 257, 260 (8th Cir. 1991) (quoting *Hensley*, 461 U.S. at 437).

"'[M]ost factors relevant to determining the amount of a fee are subsumed within the lodestar.'" *Casey*, 12 F.3d at 805 (quoting *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991)); *see Hensley*, 461 U.S. at 434 n.9 ("[I]t should [be] noted that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." (citing *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir. 1980) (en banc))). However, the court should consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *See McDonald v. Armontrout*, 860 F.2d 1456, 1459 (8th Cir. 1988).

> *Johnson* called for consideration of twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 1459 n.4. "[T]he most critical factor" in determining the reasonableness of an attorneys' fee award in civil rights litigation is "the degree of success obtained." *Hensley*, 461 U.S. at 436.

When making the determination of a reasonable fee, a court should consider the party's "overall success; the necessity and usefulness of [the party's] activity in the particular matter for which fees are requested; and the efficiency with which [the party's] attorneys conducted that activity." *Jenkins v. Missouri*, 127 F.3d 709, 718 (8th Cir. 1997) (en banc). A district court need not address exhaustively every *Johnson* factor. *Emery*, 272 F.3d at 1048. The court should consider what factors, "in the context of the present case, deserve explicit consideration." *Griffin v. Jim Jamison, Inc.*, 188 F.3d 996, 997 (8th Cir. 1999). The district court should use its own knowledge, experience and expertise in determining the amount of the fee to be awarded. *Gilbert v. City of Little Rock*, 867 F.2d 1063, 1066–67 (8th Cir. 1989).

The United States Supreme Court has cautioned that "[t]he determination of fees 'should not result in a second major litigation.'" *Fox*, 131 S. Ct. at 2216 (quoting *Hensley*, 461 U.S. at 437). Thus, while district courts must apply the correct standards, they

> need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time.

Id.; *see also Kline v. City of Kan. City, Mo., Fire Dep't*, 245 F.3d 707, 709 (8th Cir. 2001) (upholding the district court's "reasonable estimate" of the plaintiff's attorneys' fees).

3. Discussion

The court shall first determine whether CRST's requested attorneys' fees are reasonable and shall then turn to consider whether CRST is entitled to its requested out-of-pocket expenses.

a. Attorneys' fees

i. Prior to appeal

In its February 9, 2010 Order, the court calculated a lodestar amount of $3,501,394.63 for Jenner's services and a lodestar amount of $502,977.02 for Simmons's services, yielding a total of $4,004,371.65 in attorneys' fees. February 9, 2010 Order at 19–30. The court finds that this prior fee award is a useful starting point. Pursuant to *Fox*, CRST is entitled only to those fees it would not have incurred but for the frivolous, unreasonable or groundless claims. *See Fox*, 131 S. Ct. at 2215. As outlined above, the court finds that the EEOC's pattern-or-practice claim and 153 of its individual claims were unreasonable or groundless. After a review of the record and for the reasons set forth below, the court concludes that $3,724,065.63 is a reasonable estimate of the attorneys' fees incurred solely as a result of those claims.

First, the court reaches this figure by deducting 7% of the original fee award, or $280,306.02. In other words, the court estimates that, had the EEOC not asserted the unreasonable or groundless claims, CRST would still have incurred $280,306.02 in attorneys' fees in defending against the Starke claim and the 101 claims on which CRST did not obtain a judicial

determination on the merits.[11] The court finds that this is a more accurate estimate than the $35,799.73 CRST proposes. *See* Brief in Support of the Motion for Attorneys' Fees at 25, 28 (alleging that Jenner and Simmons spent a combined 147 hours on Starke's claim, for a total of $30,799.73); CRST's Reply at 20 (suggesting that the court deduct an additional $5,000 to reflect time spent researching and drafting the judicial estoppel summary judgment brief). Specifically, the court finds that CRST's proposal fails to take into account the work that Jenner and Simmons would have had to do absent the unreasonable or groundless claims—for example, the time spent drafting an answer and on general case management. *See Fox*, 131 S. Ct. at 2215. The court need not comb through the record to itemize the fees CRST would have incurred absent the unreasonable or groundless claims; rather, the court finds that, in light of its familiarity with the case, 7% is a reasonable estimate. *See id.* at 2216 ("The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection."); *see also Kline*, 245 F.3d at 709 (upholding the district court's estimate, which included a 15% deduction for "overlawerying" and a 40% reduction to reflect the plaintiffs' "limited degree of success").

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[11] The 101 claims on which CRST did not obtain a judicial determination on the merits include the 98 claims dismissed as a discovery sanction and 3 of the claims that the EEOC voluntarily withdrew. *See supra* note 6. The court estimates that 5% of the original fee award was incurred in defending against the EEOC's claim on behalf of Starke and 2% of the original fee award was incurred in defending against the 101 claims on which CRST did not obtain a judicial determination on the merits.

Second, the court finds that $3,724,065.63 is reasonable in light of the *Johnson* factors. This was a large and complicated case that involved voluminous discovery and multiple motions for summary judgment. The EEOC further complicated the case by creating confusion as to whether it asserted a pattern-or-practice claim, requiring CRST to not only defend against the individual claims but also a perceived pattern-or-practice claim. Moreover, CRST was largely successful in its efforts. Accordingly, after considering the *Johnson* factors, the court finds that $3,724,065.63 is a reasonable award for the fees CRST incurred pre-appeal.

Finally, the court rejects the EEOC's arguments that CRST's request includes fees incurred in defending against interveners' claims and "fees for work that does not meet the *Christiansburg* standard," Resistance to the Motion for Attorneys' Fees at 22, and that CRST did not provide sufficient documentation. The EEOC does not identify any specific billing entry that it contests, its suggestion that CRST included fees incurred in defending against interveners' claims is unsupported and the court finds that CRST's documentation is sufficient.

Thus, in light of the foregoing, the court concludes that CRST is entitled to $3,724,065.63 in attorneys' fees incurred pre-appeal.

ii. Appeal

The court must now consider the reasonable amount of attorneys' fees incurred during the appeal proceedings. The court begins by calculating the

lodestar amount—that is, the reasonable hourly rate multiplied by the reasonable hours spent. First, with regard to the reasonable hourly rate, the court finds that, for the reasons set forth in its February 9, 2010 Order, it is appropriate to reduce the rates charged by Jenner's attorneys and personnel to levels comparable to that of the Simmons attorneys. *See* February 9, 2010 Order at 21–24 (finding Jenner's hourly rates unreasonable in light of the prevailing rates for similar work in the community). Although CRST contends that the court should apply Jenner's hourly rates for the work performed on appeal in light of the "EEOC's all-out effort to reverse this [c]ourt's decisions, ... [the] EEOC's use of its appellate specialists to prepare its briefs and argue its case ... [and] the invaluable appellate skill and experience" that Jenner's attorneys contributed, Brief in Support of the Motion for Attorneys' Fees at 31, the court is not persuaded that CRST has satisfied its burden of demonstrating that the circumstances warrant a departure from the general practice of computing a reasonable hourly rate based on the local community. *See Blum*, 465 U.S. at 895 n.11.

Second, with regard to the reasonable hours spent, the court finds that CRST's requested hours, as set forth in the table below, are largely reasonable and supported by sufficient documentation. Significantly, the EEOC does not object to the specific number of hours spent on this case by CRST's counsel. Moreover, the court notes that this case, even at the appellate stage, was exceptionally large and complex. The EEOC

appealed 107 claims, 106 of which the court has found were unreasonable.

The court, however, rejects CRST's proposal of deducting 5% of the total claimed appellate fees to reflect hours spent on the EEOC's claim on behalf of Starke. Pursuant to *Fox*, CRST is entitled only to those fees it would not have incurred but for the frivolous, unreasonable or groundless claims. *See Fox*, 131 S. Ct. at 2215. The court finds that a conservative estimate of $51,692.28, or 10% of the total claimed appellate fees, reasonably reflects the attorneys' fees that CRST would have incurred absent the unreasonable or groundless claims. *See id.* at 2216 ("The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection."); *see also Kline*, 245 F.3d at 709 (upholding the district court's estimate, which included a 15% deduction for "overlawerying" and a 40% reduction to reflect the plaintiffs' "limited degree of success")

Thus, the court calculates the lodestar amount, and the amount the court finds reasonable under the *Johnson* factors, as $465,230.47, as set forth in the following table:

Attorney	Hours	Reasonable Rate	Award
John H. Mathias (partner)	247.50	$315	$77,962.50
Barry Levenstam (partner)	1.75	$315	$551.25
Robert T. Markowski (partner)	163.25	$315	$51,423.75

James T. Malysiak (partner)	548.00	$315	$172,620.00
Sally K. Sears Coder (partner)	34.75	$315	$10,946.25
Richard P. Campbell (of counsel)	11.50	$315	$3,622.50
Emma J. Sullivan (of counsel)	106.25	$185	$19,656.25
J. Andrew Hirth (associate)	42.00	$185	$7,770.00
Ashley M. Schumacher (associate)	304.50	$185	$56,332.50
Michele L. Slachetka (associate)	278.00	$185	$51,430.00
David P. Saunders (associate)	23.50	$185	$4,347.50
Eric J. Schwab (associate)	14.25	$185	$2,636.25
Benjamin J. Wimmer (associate)	24.00	$185	$4,440.00
Sapna G. Lalmalani (associate)	38.50	$185	$7,122.50
Christine M. Bowman (associate)	8.00	$185	$1,480.00
Cheryl J. Kras (paralegal)	105.75	$125	$13,218.75
Legal assistants	50.00	$125	$6,250.00
Kevin J. Visser	83.20	2009–$301.52 2010–$315 2011–$325 2012–$335	$25,112.75
SUBTOTAL	2,084.70		$516,922.75

Minus the 10% reduction for attorneys' fees spent on the EEOC's claim on behalf of Starke	-$51,692.28
TOTAL	$465,230.47

Finally, the court rejects the EEOC's arguments regarding CRST's requested appellate fees. Specifically, the court has already found that CRST is the prevailing party and that the *Christiansburg* standard is satisfied as to all of the claims that the EEOC appealed, other than the claim on behalf of Starke. Moreover, the court finds that CRST provided sufficient documentation and, as discussed above, the court finds that $465,230.47 reflects the total appellate fees that CRST would not have incurred but for the EEOC's unreasonable or groundless claims.

Thus, in light of the foregoing, the court concludes that CRST is entitled to $465,230.47 in attorneys' fees incurred on appeal.

b. Out-of-pocket expenses

In its February 9, 2010 Order, the court found that CRST was entitled to $463,071.25 in out-of-pocket expenses. *See* February 9, 2010 Order at 30–38. In its Brief in Support of the Motion for Attorneys' Fees, CRST "requests that the [c]ourt again award these expenses less the amount awarded by [the] [c]ourt for investigator fees in excess of the retainer payment made by CRST." Brief in Support of the Motion for Attorneys' Fees at 34. The EEOC does not dispute any specific expense. Accordingly, after reviewing the record and for the reasons set forth in its February 9,

2010 Order, the court finds that CRST is entitled to the following:

Expense	Amount awarded
Long distance telephone expenses	$176.17
Messenger and overnight delivery expenses	$5,127.86
Fees for investigators	$12,500.00
Expert witness fees	$242,212.22
Postage	$49.84
Travel and related expenses	$34,135.94
Printing and copying costs	$119,185.55
TOTAL	$413,387.58

c. Summary

Thus, consistent with the foregoing, the court finds that CRST is entitled to $3,724,065.63 in attorneys' fees incurred pre-appeal, $465,230.47 for attorneys' fees incurred as a result of the appeal and $413,387.58 in out-of-pocket expenses, for a total of $4,602,683.68.

IV. BILL OF COSTS

In its Bill of Costs filed pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920, CRST requests that the court tax costs in its favor in the amount of $91,758.46. Specifically, "CRST seeks to recover the same taxable costs that were allowed by the Clerk [of Court] on CRST's first bill of costs minus the costs incurred for ... Starke and Rolf Starke's depositions." Brief in Support of the Motion for Attorneys' Fees at 33. The EEOC does not contest any specific cost; rather, the EEOC argues that CRST is not entitled to costs because it is not the "prevailing

party" within the meaning of Rule 54(d). The EEOC contends that the February 11, 2013 Judgment does not indicate that CRST prevailed, and, to the contrary, the EEOC contends that it is now the prevailing party.

Rule 54(d)gives district courts the power to tax "costs" to a prevailing party and 28 U.S.C. § 1920 defines "costs." *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440–42 (1987). In the context of awarding costs under Rule 54(d), the Eighth Circuit Court of Appeals has held that a "prevailing party" is the party "in whose favor a judgment is rendered." *Firefighters' Inst. for Racial Equality v. City of St. Louis*, 220 F.3d 898, 905 (8th Cir. 2000) (quoting Black's Law Dictionary 1145 (7th ed. 1999)) (internal quotation mark omitted). A party need not, however, have succeeded on every claim to qualify as a prevailing party. *See Hillside Enters. v. Carlisle Corp.*, 69 F.3d 1410, 1416 (8th Cir. 1995) (upholding the district court's award of costs to a party because the party had "won a larger judgment" and, therefore, could "logically be considered the prevailing party" under Rule 54(d)); *Shum v. Intel Corp.*, 629 F.3d 1360, 1367–68 (Fed. Cir. 2010) ("A party is not required ... to prevail on all claims in order to qualify as a prevailing party under Rule 54."); *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 835 (6th Cir. 2005) ("A party is the prevailing party under Rule 54(d) even when it is only partially successful."); *Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990) (noting that the case presented "a situation where both parties ... 'prevailed' on at least one claim" but finding that the district court did not abuse its discretion in awarding costs to the

party "that prevailed on the vast majority of issues"). In the case of a mixed judgment, the district court may, in its discretion, award costs to the party that had the relatively greater success. *Hillside Enters.*, 69 F.3d at 1416.

In this case, the court has already rejected the EEOC's suggestion that this case is comprised of a single claim and the court has already determined that, for purposes of 42 U.S.C. § 2000e–5(k), CRST is the prevailing party as to the EEOC's pattern-or-practice claim and 153 of the EEOC's individual claims. The court finds that CRST is also the prevailing party for purposes of taxing costs under Rule 54(d) and 28 U.S.C. § 1920. The October 1, 2009 Judgment was undoubtedly in CRST's favor. *See* October 1, 2009 Judgment at 1 (stating that the EEOC "takes nothing"). On appeal, the Eighth Circuit Court of Appeals largely affirmed the October 1, 2009 Judgment, remanding only as to the claims on behalf of Starke and Jones. *See CRST*, 679 F.3d at 695. Thus, because CRST "prevailed on the vast majority of issues," *Roberts*, 921 F.2d at 1058, the court concludes that CRST is the prevailing party for purposes of taxing costs. Moreover, the court notes that CRST has modified its original bill of costs to reflect that it did not prevail on the EEOC's claim on behalf of Starke. With regard to the claim on behalf of Jones, the court finds no reason to reduce CRST's costs in light of the fact that the EEOC withdrew the claim on behalf of Jones under "the law of the case." Notice of Withdrawal of Claim for Tillie Jones at 1; *see also Sequa Corp. v. Cooper*, 245 F.3d 1036, 1037–38 (8th Cir. 2001) ("We do not read Rule 54(d)(1) as impairing the

inherent authority of a trial court to award costs incurred in defending an action prior to its voluntary dismissal by the plaintiff, even though a voluntary dismissal without prejudice means that neither party can be said to have prevailed.").

Thus, the court finds it appropriate to tax CRST's requested costs in its favor. The EEOC does not dispute any specific cost and the court has previously found such costs to be reasonable and authorized under 28 U.S.C. § 1920. *See* Taxation of Costs Memorandum (docket no. 303); February 9, 2010 Order at 6–12. Accordingly, costs shall be taxed in the amount of $87,323.95 for transcript fees and $4,434.51 for fees for witnesses, for a total of $91,758.46.

V. CONCLUSION

In light of the foregoing, it is **HEREBY ORDERED THAT:**

(1) Costs in the amount of **$91,758.46** are taxed in favor of CRST, pursuant to 28 U.S.C. § 1920;

(2) CRST's Motion for Attorneys' Fees (docket no. 386) is **GRANTED IN PART** and **DENIED IN PART** as follows:

(a) The EEOC is **ORDERED** to pay CRST **$4,189,296.10** in attorneys' fees; and

(b) The EEOC is **ORDERED** to pay CRST **$413,387.58** in out-of-pocket expenses;

(3) The Clerk of Court is **DIRECTED** to **ENTER JUDGMENT** in favor of CRST in the

amount of **$4,694,442.14.** This figure includes attorneys' fees, expenses and the costs taxed in favor of CRST pursuant to 28 U.S.C. § 1920; and

(4) The Clerk of Court is **DIRECTED** to **CLOSE THIS CASE.**

IT IS SO ORDERED.

Appendix C

United States Court of Appeals
Eighth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff–Appellant,
Janet Boot, Intervenor Plaintiff,
Remcey Jeunenne Peeples; Monika Starke, Intervenor Plaintiffs–Appellants,

v.

CRST VAN EXPEDITED, INC.,
Defendant–Appellee.
Equal Employment Advisory Council; Chamber of Commerce of the United States; Society for Human Resource Management; National Federation of Independent Business Small Business Legal Center,
Amici on Behalf of Appellee.

Nos. 09–3764, 09–3765, 10–1682.
Submitted: May 7, 2012.
Filed: May 8, 2012.

Before MURPHY, SMITH, and BENTON, Circuit Judges.

SMITH, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) filed suit in its own name against CRST Van Expedited, Inc. (CRST), alleging that CRST subjected Monika Starke "and approximately 270 similarly

situated female employees" to a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* Starke and Remcey Jeunenne Peeples intervened in the EEOC-instituted action and individually pursued their respective hostile work-environment claims against CRST, as well as claims for unlawful retaliation under Title VII and Iowa state law.

The district court ruled in CRST's favor on a series of dispositive motions that collectively disposed of the entire action. The district court also awarded CRST $92,842.21 in costs and $4,467,442.90 in attorneys' fees and expenses, pursuant to 42 U.S.C. § 2000e–5(k) and 28 U.S.C. § 1920, as a sanction for the EEOC's failure to reasonably investigate and conciliate in good faith its claims against CRST.

As set out below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Background

This consolidated appeal concerns a sweeping employment-discrimination suit that the EEOC instituted against CRST, one of the country's largest interstate trucking companies. The EEOC alleged that CRST was responsible for severe and pervasive sexual harassment in its New–Driver Training Program ("Training Program"). Because "we are reviewing the district court's grant of summary judgment against [EEOC, Starke, and Peeples], we recite the facts in the light most favorable to [them]." *Bonn v. City of Omaha*, 623 F.3d 587, 589 (8th Cir. 2010).

A. CRST's Business Model and Training Program

CRST is an interstate logistics and transit company that employs more than 2,500 long-haul drivers. CRST's business model relies on an efficiency measure known as "Team Driving." CRST operates the trucking industry's largest fleet of team-driven tractor trailers. Specifically, CRST assigns two drivers to a truck who alternate between driving and sleeping on-board in the truck's sleeper cab for as much as 21 days in order to maximize mileage and minimize stops.

Newly hired drivers must successfully complete CRST's Training Program before CRST permits them to drive full time for full pay as certified CRST drivers. The Training Program commences with a three-and-a-half day classroom component ("New–Driver Orientation") to orient the new drivers with CRST's methods and policies.

During new-driver orientation, CRST distributes to each trainee its "Professional Driver's Handbook" ("Driver Handbook"), which contains an entire section devoted to its anti-harassment policy, as well as the procedures for reporting such harassment. Additionally, CRST orientation leaders orally reiterate CRST's written anti-harassment policy, explain to trainees how they can report harassment complaints, and present a video stressing that CRST will not tolerate sexual harassment. The Driver Handbook expressly forbids sexual harassment, as well as any form of retaliation against complainants of sexual harassment. It also instructs employees who endure or witness harassment or discrimination to immediately

report the conduct to either an immediate supervisor or the Director of Human Resources. The Driver Handbook states that "[a]ll reports of harassment and/or discrimination will be handled in a confidential manner." CRST's charges its Human Resources Department (H.R.) with enforcing this anti-harassment policy. At New–Driver Orientation's conclusion, CRST has each trainee sign a written "Acknowledgment and Pledge Concerning Harassment and Discrimination," attesting to the facts that the trainee "received and read [CRST's] Policy Against Unlawful Harassment and Discrimination."

Following orientation, each trainee embarks on a 28–day, over-the-road training trip with an experienced, "Lead Driver," who familiarizes the trainee with CRST's Team Driving model and evaluates the trainee's performance on this maiden haul. At the conclusion of the trainee's 28–day training trip, the trainee's Lead Driver gives the trainee "a pass/fail driving evaluation" that superiors consider when determining whether to certify the trainee as a full-fledged CRST driver. But, under CRST's organizational structure, Lead Drivers lack the authority to hire, fire, promote, demote, or reassign trainees; CRST's Safety and Operations Departments make all final decisions concerning the trainees' employment. Still, in a responsive letter to the EEOC correspondence, H.R. Director James Barnes later described the Lead Driver-trainee relationship as "really no different than the role of supervisors in other industries and organizations."

B. CRST's Channels for Reporting Sexual Harassment

CRST accorded its trainees and team drivers multiple channels for reporting sexual harassment. Those channels included (1) CRST's "open-door policy," which encouraged all of its employees to approach their supervisors, any employee in the Operations or Safety Departments, or any manager about any issue; (2) toll-free phone numbers for fleet managers who were available around the clock; (3) Qualcomm, a device placed in every truck that transmits messages, similar to emails, directly to fleet managers; (4) H.R.'s nationwide toll-free number and local toll phone number, both of which CRST provided in the Driver Handbook's section on how to properly report sexual harassment; and (5) evaluation forms given to all trainees at the training trip's conclusion soliciting each trainee's feedback concerning his or her lead driver.[1]

C. Starke's Initiating Charge

On December 1, 2005, Starke filed a charge of discrimination with the EEOC. Therein, Starke alleged that CRST "discriminated against [her] on the basis of [her] sex (female) in that [she] was subjected to sexual harassment, in violation of Title VII of the Civil Rights

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[1] In April 2007, CRST added "ReportLine," an independently administered, toll-free hotline that employees may call to report, openly or anonymously, any illegal or improper conduct; ReportLine forwards all personnel-related complaints to H.R. for further review. Because the majority of the alleged harassment predates ReportLine's inception, it is of limited relevance.

Act of 1964, as amended." In the "Particulars" section of the charge form, Starke stated:

> I was hired by the [CRST] on June 22, 2005[,] in the position of Truck Driver. Since my employment began with the Respondent I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob Smith, Lead Trainer[,] began to make sexual remarks to me whenever he gave me instructions. He told me that the gear stick is not the penis of my husband, I don't have to touch the gear stick so often. "You got big tits for your size, etc...[.]" I informed Bob Smith that I was not interested in a sexual relationship with him. On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005 [,] through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were traveling in order to get a passing grade.

Upon receiving Starke's Charge, the EEOC notified CRST of the filing and instructed CRST to respond, on or before December 30, 2005, with "a written position statement on each of the allegations of the charge, accompanied by documentary evidence and/or written statements, where appropriate." The EEOC advised CRST to "include any additional information and explanation [it] deem [ed] relevant to the [Charge]." The EEOC sent CRST a corresponding, initial "request for information" asking that CRST "submit information and records relevant to the [charge]." The EEOC

assured CRST that "[t]he following dates are considered to be the 'relevant period' for the attached [r]equest for [i]nformation: January 2, 2005–November 2, 2005." The EEOC's initial request for information primarily concerned Starke's alleged harassment and did not seek information relating to other potential victims.

On December 21, 2005, CRST submitted its "position statement" to the EEOC and furnished the EEOC with all of the information that the EEOC demanded in the request for information. In its position statement, CRST denied discriminating against or harassing Starke. The company based this denial on its own internal investigation into Starke's claims against Lead Drivers Smith and Goodman. [2] CRST also disclosed the identity of two other female drivers, Lori

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[2] Specifically, CRST contended that it interviewed eyewitnesses and the alleged wrongdoers themselves about the matter. With respect to Smith, CRST interviewed Frank Taylor, an eyewitness to some of the alleged harassment, who confirmed that Smith made inappropriate remarks to Starke. Taylor stated that he admonished Starke to abstain from driving with Smith on her training trip if she felt uncomfortable, but that Starke continued driving with Smith anyway. For his part, Smith admitted to uttering inappropriate comments, but he maintained that "nothing physical" transpired between Starke and himself. Regarding Goodman, H.R. discovered that, on August 3, 2005, Starke reported on her evaluation form that Goodman had treated her "very well." When CRST confronted Goodman about Starke's allegations, Goodman acknowledged having a sexual relationship with Starke but averred that it was consensual. Goodman's co-driver, Timothy Walker, corroborated Goodman's account that the relationship was consensual, asserting that he overheard four "love messages" that Starke had left on Goodman's voicemail.

Essig and Tamara Thiel, who, like Starke, had filed formal charges of discrimination with the EEOC against CRST.

D. The EEOC's Investigation and Reasonable Cause Determination

In the months that followed, the EEOC sent multiple supplemental requests for information to CRST. Over the course of the investigation, the EEOC learned that, in addition to Starke, Essig, and Thiel, female drivers Rhonda Morgan and Peeples had also filed discrimination charges against CRST for alleged sexual harassment. On July 28, 2006, the EEOC submitted a third supplemental Request for Information to CRST. This third request for information asked that CRST furnish "a copy of all other [c]harges of [d]iscrimination that CRST has received in the past five years from any government agency that alleges sexual harassment." Additionally, the EEOC demanded "the name, gender, home address, and home telephone number of all employees that were trained by either [Smith] and/or [Goodman]," including "the dates of the training and documentation of any complaints made against these two trainers by any of these trainees."

On March 22, 2007, the EEOC presented CRST with a fourth supplemental request for information seeking detailed contact information for all of its dispatchers who worked during a complaint-relevant time and for female drivers that began working after January 1, 2005.

On July 12, 2007, the EEOC presented CRST with its "Letter of Determination," which (1) notified CRST that the EEOC had found reasonable cause to believe that CRST subjected Starke and "a class of employees" to sexual harassment on the basis of gender and (2) offered to conciliate the claim.

E. The EEOC's and CRST's Conciliation

On August 6 and August 7, 2007, CRST counsel Thomas D. Wolle contacted EEOC Investigator Pamela Bloomer to confirm CRST's desire to conciliate with the EEOC. On August 8, 2007, Bloomer left Wolle a voicemail message asking Wolle to send CRST's conciliation proposal by August 16, 2007. Wolle responded that he preferred that the EEOC initiate the proposal process.

On August 17, 2007, Wolle and Bloomer held a telephone conversation during which Bloomer told Wolle that the EEOC would require CRST to send a letter to past and present employees to help identify class members who might be part of a settlement. On August 24, 2007, Wolle telephoned Bloomer to inform her that he had spoken with Starke's counsel and that, from that conversation, CRST had determined that conciliation appeared futile. Wolle promised to send an email confirming CRST's position regarding the futility of conciliation. Bloomer responded that "the next step after conciliation would be [the] EEOC's internal decision whether to litigate on behalf of [Starke] and the class or provide [Starke] with a [right-to-sue] letter."

The parties could reach no agreement on conciliation and, on August 28, 2007, the EEOC notified CRST that the EEOC had "determined that its efforts to conciliate [the Charge] as required by [Title VII] have been unsuccessful." The EEOC added that because "further conciliation efforts would be futile or non-productive," it would "not make further efforts to conciliate [the Charge]" and was "forwarding the case to [its] legal unit for possible litigation."

F. The Instant Lawsuit

On September 27, 2007, the EEOC filed the instant lawsuit seeking redress for the discrimination that Starke "and a class of similarly situated female employees of [CRST]" allegedly endured. The EEOC brought the suit in its own name, pursuant to § 706 of Title VII, 42 U.S.C. § 2000e–5, "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Starke] and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." The amended complaint alleged, in pertinent part, as follows:

> 7. ... two of [CRST's] [L]ead [D]rivers subjected Starke to sexual harassment during their supervision of Starke (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions of sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its [L]ead [D]rivers and

> because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect Starke from the harassment and the hostile work environment, culminating in her discharge from employment with CRST.
>
> 8. Other similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST....
>
> 9. The effect of the practices complained of in Paragraphs 7 and 8 has been to deprive Starke and a class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

The EEOC alleged that CRST perpetrated these actions intentionally and "with malice or with reckless indifference to the federally protected rights of Starke and the class of similarly situated female employees."

In its prayer for relief, the EEOC sought (1) "a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment, [and] any other employment practice which discriminates on the basis of sex"; (2) an order compelling "CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices"; (3) a "make[-]whole" order awarding Starke and the class backpay and benefits

with prejudgment interest; (4) an order awarding Starke and the class compensatory damages and punitive damages; and (5) an order awarding the EEOC the costs of this action.

From September 27, 2007, the date that the EEOC filed suit, until nearly two years thereafter, the EEOC did not identify the women comprising the putative class despite the district court's and CRST's repeated requests to do so. According to the district court, "it was unclear whether the instant Section 706 lawsuit involved two, twenty or two thousand 'allegedly aggrieved persons.'" *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 2524402, at *8 (N.D. Iowa Aug. 13, 2009) (quoting 42 U.S.C. § 2000e–5(f)(1)). The district court concluded that "the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief," but "[i]nstead ... was using discovery to find them."[3] *Id.* at *9.

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[3] The district court supported this conclusion with the following chronology of discovery in the case:

> On May 29, 2008, for example, the EEOC sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit. On September 28, 2008, the EEOC sent another 730 solicitation letters to former CRST female employees. There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

On August 8, 2008, CRST asked the court to establish a date "by which the EEOC completes its identification of class members." Response (docket no. 38), at 4. The EEOC responded that it had identified "a total of 49 class members so far," predicted the "total class will reach between 100 and 150 individuals," indicated it believed it could identify "the bulk of the class members" by October 15, 2008, and suggested a December 7, 2008 deadline for identifying the "class members." Reply (docket no. 42), at 1–3.

On August 20, 2008, the court set a[n] October 15, 2008 deadline for the EEOC "to disclose the identit[ies] of class members." The court also continued the parties' previously agreed-upon discovery deadline to January 15, 2009.

By October 15, 2008, the EEOC identified approximately 270 allegedly aggrieved persons to CRST. The number of "class members" greatly increased in the ten days immediately preceding the deadline. Prior to October 7, 2008, the EEOC had identified only seventy-nine "class members" to CRST. On October 7, 2008, the EEOC identified 40 new "class members" and advised CRST that the "[i]nvestigation is continuing." Seventh Supplement to Initial Disclosures (docket no. 243–5), at 1. On October 15, 2008, the EEOC identified 119 more "class members" and again advised CRST that the "[i]nvestigation is continuing." Eighth Supplement to Initial Disclosures (docket no. 243–6) at 1; Ninth Supplement to Initial Disclosures (docket no. 243–7), at 1; Tenth Supplement to Initial Disclosures (docket no. 243–8), at 1. Also on October 15, 2008, the EEOC partially identified 66 additional persons and stated [that] "the EEOC expects [that] all [of] these individuals are class members...." Eleventh Supplement to Initial Disclosures (docket no. 243–9), at 1. Again, the EEOC stated that the "[i]nvestigation is continuing." *Id.* at 1.

The district court issued two orders to the EEOC, compelling the agency to (1) immediately amend its list of 270 women as soon as it learn of any women whose claims it no longer wished to pursue and (2) make all

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> The total number of allegedly aggrieved persons identified or partially identified by the EEOC by October 15, 2008[,] was much greater than CRST had anticipated based upon the EEOC's prior representations to the court. *See, e.g.*, Response (docket no. 42), at 1–2 (EEOC estimates "the total class will reach between 100 and 150 individuals"); Scheduling Order at 2 (EEOC estimates a twenty-day trial). Therefore, on November 6, 2008, CRST filed a "Motion under Rule 16(f) for an Order to Show Cause Concerning the EEOC's Identification of Class Members." Motion to Show Cause (docket no. 56). CRST alleged that the EEOC did not have a good-faith basis for naming so many allegedly aggrieved persons; CRST accused the EEOC of adopting a policy of "naming everyone and asking questions later" just before the October 15, 2008 deadline. Brief in Support of Motion to Show Cause (docket no. 56–2), at 10. CRST alleged that the EEOC had simply added a large number of names found in CRST's human resources files without ever speaking to those individuals. Further, the EEOC had indicated to CRST that it reserved unto itself the option in the future "to remove some women from this list at a later date." *Id.* at 11.
>
> ... The court took the EEOC at its word that it had a good-faith belief that each and every one of the approximately 270 women it had disclosed to CRST before the deadline had an actionable claim for sex discrimination.... The court expressed concern, however, that "CRST [still] might unfairly face a 'moving target' of prospective plaintiffs as discovery winds down and trial approaches." Order (docket no. 66), at 8.

Id. at *9–10 (footnote omitted and alterations added, in part).

women on whose behalf it sought relief available to CRST for deposition. *Id.* at *10. The district court warned the EEOC that its failure to present any women for deposition before discovery's conclusion on January 15, 2009, would result in a "discovery sanction" forbidding that woman from testifying at trial and barring the EEOC from seeking relief on her behalf in the case. *Id.* As authority for this order, the district court "invoked its inherent case [-]management authority" under, *inter alia*, Federal Rules of Civil Procedure 26(f) and 16(b). *Id.* Thereafter, the EEOC made 150 of the 270 women available for deposition, prompting the district court to honor its prior order by precluding the EEOC from pursuing relief for the remaining 120 women. *Id.* at *11.

The district court, in a series of five orders, dismissed the EEOC's claims relating to over half of these 150 women. We recite only the dismissals that the EEOC currently appeals. In all, the EEOC appeals the district court's dismissal of its claims as to 107 women. First, on May 13, 2009, the district court granted CRST summary judgment against three women,[4] including Starke, reasoning that the women were judicially estopped from prosecuting their claims. *EEOC v. CRST Van Expedited, Inc.*, 614 F. Supp. 2d 968 (N.D. Iowa 2009). The court applied judicial estoppel because each woman failed to disclose on her bankruptcy petition her involvement or potential involvement in the instant lawsuit. *Id.* at 973–76. As part of this first order, the district court also judicially

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[4] Starke, Christina Payne, and Robin Timmons.

estopped the EEOC from seeking redress for the three women's alleged harassment. *Id.* at 976–77. Second, on June 2, 2009, the district court granted CRST summary judgment, on the merits, as to Peeples because she (1) failed to report her alleged harassment to CRST in a timely manner and (2) failed to create a genuine issue of material fact as to all of the essential elements of her retaliatory-discharge claim. *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 1586193 (N.D. Iowa June 2, 2009). Third, on June 18, 2009, the district court granted CRST global summary judgment as to the EEOC's claims on behalf of 11 women[5] and partial summary judgment as to the EEOC's claims on behalf of 8 others;[6] the district court premised these rulings on either the individual claimants' failure to timely report alleged sexual harassment or CRST's prompt and effective response to the reports that it actually received. *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 1783495 (N.D. Iowa June 18, 2009). Fourth, on July 6, 2009, the district court granted CRST summary judgment as to the EEOC's claims on behalf of three women[7] because the alleged harassment was not sufficiently severe or

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[5] Bonnie Batyik, Bethany Broeker, Kim Chisholm, Samantha Cunningham, Denise Desonier, Maybi Fernandez–Fabre, Ginger Laudermilk, Verona McIver, Faith Shadden, Rachel Tucker, and Diana Vance.

[6] Pamela Barlow, Peggy Blake, Donna Dickson, Nicole Edwards, Zelestine Grant, Martha Griffin, Carole Pettit, and Rhonda Wellman.

[7] Victoria Holmes, January Jackson, and Tillie Jones.

pervasive. Fifth, on July 9, 2009, the district court granted CRST summary judgment as to the EEOC's claims on behalf of, *inter alia*, 25 women[8] for their failure to timely report alleged harassment and/or the lack of severity or pervasiveness of the alleged harassment. *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 2068386 (N.D. Iowa July 9, 2009).

Finally, on August 13, 2009, the district court barred the EEOC from seeking relief for the remaining 67 women after concluding that the EEOC had failed to conduct a reasonable investigation and *bona fide* conciliation of these claims—statutory conditions precedent to instituting suit. *EEOC v. CRST Van Expedited, Inc.*, No. 07–CV–95–LRR, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009). Having disposed of all the allegedly aggrieved women in the EEOC's putative "class," the district court dismissed the EEOC's complaint.

We now consider three consolidated appeals: (1) Starke's and Peeples's joint appeal,[9] in which Starke appeals the summary judgment of her case on judicial

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[8] Antoinette Baldwin, Mary Beaton, Catherine Coronado, Dorothy Dockery, Catherine (Granofsky)–Fletcher, Debra Hindes, Tracy Hughes, January Jackson, Patricia Marzett, Virginia Mason, Lucinda McBlair, Bonnie Moesch, Sherry O'Donnell, Christina Payne, Tammi Pile, Sharon Pinchem, Peggy Pratt, Danette Quintanilla, Kathleen Seymour, Jonne Shepler, Linda Skaggs, Mary "Emily" Smith, Jennifer Susson, Robin Timmons, and Betsy Ybarra.

[9] Appeal No. 09–3764.

estoppel grounds and additionally joins Peeples in appealing summary judgment on the merits; (2) the EEOC's first numbered appeal,[10] consolidated with Starke's and Peeples's, in which the EEOC appeals the district court's multiple dispositive rulings that we recounted above; and (3) the EEOC's second numbered appeal,[11] in which it challenges the district court's award of attorneys' fees.

II. Discussion

A. EEOC's Investigation and Conciliation

In its first point on appeal, the EEOC urges that we reverse the district court's decision to bar the EEOC from pursuing claims as to 67 women based on its failure to reasonably investigate or good-faith conciliate. We hold that the district court did not err in dismissing the EEOC's claims as to 67 women for its failure to investigate and conciliate them.

1. Overview of Title VII's Pre-suit Requirements

Section 706 of Title VII, the provision under which the EEOC sued, authorizes the EEOC to bring suit in its own name, on behalf of a "person or persons aggrieved" by the employer's unlawful employment practice. 42 U.S.C. § 2000e–5(f)(1); *accord Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 324, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) ("Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the

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[10] Appeal No. 09–3765.

[11] Appeal No. 10–1682.

remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals."). However, "[a]s originally enacted[,] Title VII did not empower the [EEOC] to sue employers to enforce the Act." *EEOC v. Hickey–Mitchell Co.*, 507 F.2d 944, 947 (8th Cir. 1974) (citing Act of July 2, 1964, Pub. L. 88–352, tit. VII, 78 Stat. 253).

> Rather, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" equality of employment opportunities. Voluntary compliance proved elusive, however, as more than half of the EEOC's conciliation efforts were deemed unsuccessful. Consequently, Congress enacted the Equal Employment Opportunity Act of 1972 which amended Title VII to permit the EEOC suits. The statutory mandate that the EEOC attempt conciliation was not abandoned, however, and the Act expressly conditions the EEOC's power of suit on its inability to "secure from the respondent a conciliation agreement acceptable to the EEOC."

Id. (internal footnotes omitted); *accord Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977).

Thus, "[i]n the Equal Employment Opportunity Act of 1972, Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co.*, 432 U.S. at 359, 97 S. Ct. 2447

(internal footnote omitted). First, an employee files with the EEOC a charge "alleging that an employer has engaged in an unlawful employment practice." *Id.* Second, "[t]he EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Id.* If reasonable cause does exist, the EEOC moves to the third step, which attempts to remedy the objectionable employment practice through the informal, nonjudicial means " 'of conference, conciliation, and persuasion.'" *Id.* (quoting 42 U.S.C. § 2000e–5(b)). However, if unsuccessful, the EEOC may move to the fourth and final step and bring a civil action to redress the charge. *Id.* at 359–60, 97 S. Ct. 2447 (quoting 42 U.S.C. § 2000e–5(f)(1)).

As we have recognized, the EEOC's "'power of suit and administrative process [are not] unrelated activities, [but] *sequential steps in a unified scheme* for securing compliance with Title VII.'" *Hickey–Mitchell Co.*, 507 F.2d at 948 (alterations in original) (emphasis added) (quoting *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974)); *accord EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981).

2. Adequacy of the EEOC's Investigation and Conciliation

The district court barred the EEOC from pursuing claims as to 67 women based on its conclusion that "the EEOC did not investigate, issue a reasonable cause determination or conciliate the claims." *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *19. On appeal, the EEOC avers that the district court wrongly concluded that the EEOC's investigation, resulting

reasonable-cause determination, and conciliation were insufficient to satisfy § 706. It argues that the district court (1) misconstrued the EEOC's efforts through serial requests for information to investigate discrimination suffered by persons other than Starke; and (2) incorrectly assumed that the "EEOC had to investigate, issue a cause finding [regarding], and conciliate each individual instance of CRST's failure to respond appropriately to a harassment complaint." The EEOC contends that it "needed only to investigate, issue a cause finding as to, and conciliate each *type* of discrimination alleged."

In its analysis, the district court acknowledged that "the EEOC was entitled to expand its investigation of Starke's Charge and consider whether CRST had tolerated the sexual harassment of other female drivers." *Id.* at *15. It noted that, during the course of its investigation, the EEOC did discover "the allegations of a number of other female drivers, including Essig, Morgan, Peeples and Thiel." *Id.* (concluding that these female drivers' allegations of sexual harassment grew out of the EEOC's investigation of Starke's Charge). The court also recognized that it could "not second-guess the EEOC's finding in the Letter of Determination that," *inter alia*, reasonable cause existed "'to believe that [CRST] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII.'" *Id.*

Nevertheless, the court determined that, based on the factual record in this case, "the EEOC did not conduct *any* investigation of the specific allegations of

the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint—let alone issue a reasonable cause determination as to those allegations or conciliate them." *Id.* at *16. The district court concluded that the EEOC "wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons for whom the EEOC ... intend[ed] to seek relief at trial." *Id.* The court based its conclusion upon the following, undisputed facts:

- The EEOC did not investigate the specific allegations of any of the 67 allegedly aggrieved persons until after the Complaint was filed. For example, the EEOC did not interview any witnesses or subpoena any documents to determine whether any of their allegations were true.
- The EEOC did not identify any of the 67 allegedly aggrieved persons as members of the Letter of Determination's "class" until after it filed the Complaint. Indeed, prior to filing the Complaint, CRST enquired as to the size of the "class[,]" and the EEOC responded that it did not know.
- The EEOC did not make a reasonable[-]cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the Complaint. Indeed, at the time the EEOC issued the Letter of Determination on July 12, 2007, 27 of the remaining 67 allegedly aggrieved persons *had not yet been sexually harassed.* Indeed, most of these 27 women allege they were sexually harassed *after the instant*

> *lawsuit was filed.* Although 38 of the remaining 40 allegedly aggrieved persons allege [that] they were sexually harassed before the EEOC issued the Letter of Determination on July 12, 2007, the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint. The EEOC used discovery in the instant lawsuit to find them.
>
> - The EEOC did not attempt to conciliate the specific allegations of the 67 allegedly aggrieved persons prior to filing the Complaint.

Id. (internal footnote omitted).

The EEOC's suit alleging multiple acts of discrimination by CRST arose out of Starke's single initiating charge. Relevant precedents permit such an expansion by the EEOC, so long as the EEOC satisfies all of its pre-suit obligations for each additional claim. The Supreme Court has observed that when the EEOC brings suits under § 706 on behalf of a group of aggrieved persons, the EEOC is "master of its own case." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). And, as a general rule, "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency." *EEOC v. KECO Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984).

Although "the EEOC enjoys wide latitude in investigating and filing lawsuits related to charges of discrimination, Title VII limits that latitude to some degree by 'plac[ing] a strong emphasis on administrative, rather than judicial, resolution of

disputes.'" *U.S. Equal Opportunity Comm'n v. Dillard's Inc.*, No. 08–CV–1780–IEG (PCL), 2011 WL 2784516, at *5 (S.D. Cal. July 14, 2011) (slip op.) (quoting *EEOC v. Jillian's of Indianapolis, Ind., Inc.*, 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003)). For our part, we have recognized that

> [t]he permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge. The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or *developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

EEOC v. Delight Wholesale Co., 973 F.2d 664, 668 (8th Cir. 1992) (emphasis added). Thus, while "[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged," it "must discover such individuals and wrongdoing *during the course of its investigation.*" *Dillard's Inc.*, 2011 WL 2784516, at *6 (citing *Jillian's*, 279 F. Supp. 2d at 980; *EEOC v. Harvey L. Walner & Assoc.*, 91 F.3d 963, 968 (7th Cir. 1996) ("[The] EEOC may allege in a complaint whatever unlawful conduct it has uncovered during the

course of its investigation, provided that there is a reasonable nexus between the initial charge and the subsequent allegations in the complaint."); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 318 (7th Cir. 1996) ("[The EEOC] may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals beyond the charging parties who are identified during the investigation."); *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 380 (6th Cir. 2002) ("[W]here facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." (internal quotation marks omitted)); *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994) ("[T]he jurisdictional scope of [an individual] Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation.") (internal quotation marks omitted)). "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation." *Id.* (citing *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1263 (D. Colo. 2007) (citing *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981))).

In summary, while we recognize that "[t]he EEOC enjoys significant latitude to investigate claims of discrimination, and to allege claims in federal court based on the results of its investigations," we find "a

clear and important distinction between 'facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit.'" *Id.* at *7 (quoting *Jillian's*, 279 F. Supp. 2d at 982).[12] "Where the scope of its pre-litigation efforts are limited—in terms of geography, number of claimants, or nature of claims—the EEOC 'may not use discovery in the resulting lawsuit "as a fishing expedition" to uncover more violations.'" *Id.* (quoting *EEOC v. Target Corp.*, No. 02–C–146, 2007 WL 1461298 (E.D. Wis. May 16, 2007) (citing *Walner*, 91 F.3d at 971)).

Here, after Bloomer discovered during the course of her investigation that Essig, Morgan, Peeples, and

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[12] In *Jillian's*, the district court explained that

> [i]t was only after conducting discovery with respect to its original complaint that the EEOC decided to expand its lawsuit to include a nationwide class. The Seventh Circuit approached this issue in *Walner*, where it impliedly distinguished between facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit. "We wholeheartedly agree with EEOC's point that it may obtain relief for instances of discrimination that it discovers during an investigation of a timely charge.... However, these investigations may not be accomplished through a process of discovery that follows a complaint based upon an insufficient charge of discrimination." *Id.* at 971–972 (emphasis added). We conclude that the same standard must be applied to the relationship between the lawsuit and its underlying investigation as is applied to the relationship between the lawsuit and its underlying charge.

Id. at 981–82.

Thiel "had filed formal charges of discrimination against CRST for alleged sexual harassment," the EEOC requested that "CRST provide 'a copy of all other [c]harges of [d]iscrimination that [CRST] has received in the past five years from any government agency that alleges sexual harassment.'" *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *3. It additionally requested that CRST provide "'the name, gender, home address, and home telephone number of all employees that were trained by either [Smith] and/or [Goodman],' including 'the dates of the training and documentation of any complaints made against these two trainers by any of these trainees.'" *Id.* The EEOC later requested information for "female driver[s] that began [their] employment on or after January 1, 2005." *Id.* at *4. Although CRST felt that the EEOC's request for such information was "overly broad," it ultimately "mailed the remainder of the information to the EEOC on a computer disc." *Id.* at *5. Thereafter, the EEOC issued a Letter of Determination to CRST, stating, *inter alia*, that "'there is reasonable cause to believe that [CRST] has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII.'" *Id.* at *6.

"The Letter of Determination did not provide CRST with any notice as to the size of the 'class of employees and prospective employees [subjected] to sexual harassment.'" *Id.* at *8. And, during conciliation, the EEOC was unable "to provide [CRST] names of all class members ..., or an indication of the size of the class." *Id.* at *7. Likewise, "the EEOC's Complaint provides no indication of how many 'similarly situated

female employees' the EEOC alleged to exist." *Id.* at *8. It was not until *after* the commencement of the instant suit that the EEOC sought to ascertain the size of the class. *See id.* at *9 ("On May 29, 2008, for example, the EEOC sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit. On September 28, 2008, the EEOC sent another 730 solicitation letters to former CRST female employees. There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial."). The number of purported class members continuously changed throughout the discovery process. *See id.* at *9–10. Ultimately, the EEOC identified 67 members of the "class." *Id.* at *10.

The EEOC's aforementioned conduct demonstrates that it did not reasonably investigate the class allegations of sexual harassment "during a reasonable investigation of the charge." *Delight Wholesale Co.*, 973 F.2d at 668. Instead, it engaged in fact-gathering as to the "class" "during the discovery phase of an already-filed lawsuit." *Dillard's Inc.*, 2011 WL 2784516, at *7 (quotation and citation omitted). Our review of the undisputed facts demonstrates that the EEOC was "us[ing] discovery in the resulting lawsuit as a fishing expedition to uncover more violations." *Id.* (quotation and citation omitted). "[T]he EEOC did not investigate

the specific allegations of *any* of the 67 allegedly aggrieved persons [, i.e., the class members,] until *after* the Complaint was filed." *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *16 (emphasis added). Tellingly,

> at the time the EEOC issued the Letter of Determination on July 12, 2007, 27 of the remaining 67 allegedly aggrieved persons had not yet been sexually harassed. Indeed, most of these 27 women allege they were sexually harassed after the instant lawsuit was filed. Although 38 of the remaining 40 allegedly aggrieved persons allege they were sexually harassed before the EEOC issued the Letter of Determination on July 12, 2007, the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint.

Id.

Absent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate. *See EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 366 n.14 (4th Cir. 1976) ("Since the determination of reasonable cause defines the framework for conciliation, it follows that the issues to be litigated here must be those which can fairly be said to be encompassed within the determination resulting from the [initiating] charge.") (quotations and citation omitted).[13]

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[13] "Notably, the EEOC did *not* allege that CRST was engaged in 'a pattern or practice' of illegal sex-based discrimination or otherwise

Moreover, contrary to the EEOC's contention, the district court did not abuse its discretion in opting to dismiss, rather than stay, the EEOC's complaint as to these 67 women. Under § 706(f)(1) of Title VII, "[u]pon request, the court *may, in its discretion,* stay further proceedings for not more than sixty days pending ... further efforts of the EEOC to obtain voluntary compliance." 42 U.S.C. § 2000e–5(f)(1) (emphasis added). The EEOC concedes in its brief that our review of the district court's decision to stay or dismiss an EEOC suit for failure to satisfy Title VII's pre-suit requirements is for abuse of discretion. In its order below, the district court concluded that "[h]ere, dismissal is a severe but appropriate remedy," footnoting that it "might have stayed the instant action for further conciliation in lieu of dismissal" "[h]ad the EEOC not wholly abdicated its role in the administrative process." *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *19 & n.24. The present record confirms that the EEOC wholly failed to satisfy its

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plead a violation of Section 707 of Title VII, 42 U.S.C. § 2000e–6." *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *7 n.14. The district court had "assumed [that] the EEOC had the right to maintain a pattern-or-practice claim in this case but dismissed it with prejudice. The court held as a matter of law that there was insufficient evidence from which a reasonable jury could find that it was CRST's 'standard operating procedure' to tolerate sexual harassment." *Id.* We, like the district court, "express [ ] no view as to whether the EEOC's investigation, determination and conciliation of Starke's Charge would be sufficient to support a *pattern [-]or-practice* lawsuit." *Id.* at *16 n.21 (citing *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 934–44 (N.D. Ill. 2001) (permitting the EEOC to use discovery to find more victims of sexual harassment in a pattern-or-practice case)).

statutory pre-suit obligations as to these 67 women, thus we cannot conclude that the district court abused its discretion in dismissing the EEOC's suit.

B. Judicial Estoppel

1. Judicial Estoppel as Applied to Starke, Payne, and Timmons

The district court also granted summary judgment on the individual claims of Starke, Payne, and Timmons, and also on the EEOC's claims on their behalf. *CRST Van Expedited, Inc.*, 614 F. Supp. 2d at 973–77. Specifically, the district court concluded that, because each of the three women failed to disclose her involvement in the instant lawsuit as a potential source of income on her bankruptcy petition, she is judicially estopped from seeking relief. *Id.* Likewise, the district court also applied judicial estoppel to the EEOC, precluding the EEOC from seeking redress in its own § 706 suit for harassment that Starke, Payne, or Timmons allegedly suffered. *Id.* at 973.

In October 2005, Starke and her husband filed, in the federal bankruptcy court for the Northern District of Texas, a voluntary petition as joint debtors praying for protection under Chapter 7 of the Bankruptcy Code. They did not include a claim for sexual harassment among their contingent assets in their petition, nor did they amend their petition at anytime between December 2005, when Intervener Starke initially filed her administrative charge of discrimination with the EEOC, or March 2006, when the bankruptcy court fully discharged their debts. In December 2008, three months after intervening in the instant lawsuit and

over one year after the EEOC filed it, Starke moved to reopen her and her husband's joint bankruptcy to add the claim as a potential asset.

Similarly, in October 2005, Payne filed, in federal bankruptcy court for the Southern District of Ohio, a voluntary petition under the name of "Christina Sprinkle" for protection under Chapter 13 of the Bankruptcy Code. Payne omitted from her list of assets any potential claim against CRST for sexual harassment. After the EEOC filed the instant lawsuit in September 2007, Payne did not amend her petition's asset schedules to include the claim. On May 24, 2010, Payne received a full discharge.

In March 2008, Timmons and her husband filed, in federal bankruptcy court for the Western District of Missouri, a voluntary petition as joint debtors seeking protection under Chapter 7 of the Bankruptcy Code. Timmons did not disclose any potential cause of action against CRST and, in June 2008, she and her husband received a full discharge.

We review for abuse of discretion a district court's invocation of judicial estoppel. *Triple H Debris Removal, Inc. v. Companion Prop. & Cas. Ins. Co.*, 647 F.3d 780, 785 (8th Cir. 2011) (citing *Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co.*, 617 F.3d 1040, 1051 (8th Cir. 2010)). We apply this deferential standard of review based on our acknowledgment that the district court is best equipped to decide judicial estoppel's applicability "because determining whether a litigant is playing fast and loose with the courts has a subjective element and its resolution draws upon the trier's intimate knowledge of the case at bar and his or her

first-hand observations of the lawyers and their litigation strategies." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1046 (8th Cir. 2006) (quotation, alteration, and citation omitted). We will uphold the district court's decision to apply judicial estoppel "unless it plainly appears that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the proper factors." *Id.* at 1046–47 (quotations and citation omitted).

As an initial matter, we need not address Starke's contention that the district court abused its discretion in judicially estopping her from prosecuting her intervener claims against CRST. Starke alleges in her brief that the district court failed to consider certain mitigating factors counseling against judicial estoppel's application. Specifically, Starke maintains that she inadvertently failed to include her intervener claim in her bankruptcy petition. She claims that the language barrier created by her German birth and consequent lack of fluency in English limited her ability to assist her bankruptcy counsel. Starke also notes that, "as soon as [she] learned that her claim against CRST should have been disclosed, [she] took immediate steps to have the bankruptcy reopened and her filings amended to contain the claim against CRST." However, Starke's counsel conceded at oral argument that Starke lacked standing to assert her Title VII claim.[14] In light

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[14] At oral argument, the court inquired as to whether, "in light of the bankruptcy proceeding" and *United States ex rel. Gebert v. Transport Administrative Services*, 260 F.3d 909 (8th Cir. 2001), Starke had standing to pursue her claim. In response, Starke's counsel stated:

of this concession, we need not address Starke's appeal of the district court's decision to judicially estop Starke from pursuing her intervener claims against CRST, and we instead consider only whether the district court abused its discretion in judicially estopping Payne and Timmons.

As the Supreme Court has explained, the doctrine of judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)). By logical extension, "[j]udicial estoppel [also] prevents a person who states facts under oath during the course of a trial from denying those facts in a second suit, even though the parties in the second suit may not be the same as those in the first." *Stallings*, 447 F.3d at 1047 (quotations and citation omitted). This doctrine "protects the integrity of the judicial process." *Id.*

> It sounds to me like, in all honesty, she probably never should have been in the district court. There probably never should have been merits of determination against her. There was not only no jurisdiction here, there was no jurisdiction there. Looking at it now, I think we did the best we could. There shouldn't have been merits of determination. It should have been a dismissal without prejudice in the district court. *In all honesty, there is no standing, no jurisdiction ever.* That is how I see that. Thank you.

(Emphasis added.)

(quotations and citation omitted). Although "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *id.* (citing *New Hampshire*, 532 U.S. at 750, 121 S. Ct. 1808), the Supreme Court, in *New Hampshire v. Maine*, articulated a non-exhaustive list of "[t]hree factors ... [to] aid a court in determining whether to apply the doctrine," *id.* (citing *New Hampshire*, 532 U.S. at 751, 121 S. Ct. 1808).

> "First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Id. (quoting *New Hampshire*, 532 U.S. at 750–51, 121 S. Ct. 1808).

Taking each factor in turn, we conclude that the district court did not abuse its discretion by judicially estopping Payne and Timmons from pursuing their respective claims insofar as they may seek to

subsequently intervene in the EEOC's action or otherwise seek relief individually. Notably, with respect to the first factor concerning a clear inconsistency between former and subsequent positions, we have observed that, "[i]n the bankruptcy context, a party may be judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Id.* Estoppel may apply because "a debtor's failure to list a claim in the mandatory bankruptcy filings is tantamount to a representation that no such claim existed." *Id.* (quotations and citation omitted). As recounted above, none of the women disclosed their involvement or potential involvement in this action.

"The second *New Hampshire* factor requires that the bankruptcy court have adopted the debtor's position." *Id.* at 1048. This factor might be satisfied "where the bankruptcy court issues a 'no asset' discharge," thereby evidencing that "the bankruptcy court has effectively adopted the debtor's position." *Id.* Again, as already noted, Payne, and Timmons each procured a full discharge without disclosing her potential claim against CRST. In contrast, in *Stallings*, we found "no judicial acceptance of Stallings's inconsistent position" because "the bankruptcy court never discharged Stallings's debts based on the information that Stallings provided in his schedules." *Id.* at 1149. Payne filed her bankruptcy petition in 2005, prior to the institution of suit, but that does not spare her from possible judicial estoppel. Under the principles of judicial estoppel, she was still obliged to

amend her petition to disclose her involvement or potential involvement in the post-petition lawsuit. *Id.* at 1148. As we stated in *Stallings*,

> a debtor who files h[er] bankruptcy petition, subsequently receives a right-to-sue letter from the EEOC, and then fails to amend h[er] bankruptcy petition to add h[er] lawsuit against h[er] employer as a potential asset is estopped from bringing the lawsuit because the debtor "knew about the undisclosed claims and had a motive to conceal them from the bankruptcy court." *DeLeon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003).

Id.

"Under the final *New Hampshire* factor, the debtor's non-disclosure of the claim must not be inadvertent and must result in the debtor gaining an unfair advantage." *Id.* We have stressed that, pursuant to this third factor, a district court should not judicially estop a debtor whose prior inconsistent position was attributable to "a good-faith mistake rather than as part of a scheme to mislead the court." *Id.* (quotations and citation omitted); *accord New Hampshire*, 532 U.S. at 753, 121 S. Ct. 1808 ("We do not question that it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." (quotations and citation omitted)). That said, no evidence of any such good-faith error or omission is present in this case. In fact, some evidence suggests otherwise. As already noted, Starke herself concedes that the district court correctly judicially estopped her. Also, Timmons and her

husband filed their joint petition an entire year after the EEOC instituted suit in this matter, indicating, at the very least, that they had notice of Timmons's potential claim.

Finally, as the district court noted, "[t]he actions of ... Ms. Timmons are especially galling" because she "used the bankruptcy process to discharge or reduce debts *owed to CRST* and now seek[s] to recover funds from CRST free and clear of the bankruptcy process." *CRST Van Expedited, Inc.*, 614 F. Supp. 2d at 975 (citing *New Hampshire*, 532 U.S. at 750, 121 S. Ct. 1808). "'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, *especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.*'" *New Hampshire*, 532 U.S. at 749, 121 S. Ct. 1808 (emphasis added) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 39 L. Ed. 578 (1895)).

Accordingly, based on this record, we cannot conclude that the district court abused its discretion in judicially estopping Payne or Timmons from individually pursuing their respective claims against CRST for sexual harassment.

2. Judicial Estoppel as Applied to EEOC

The district court also invoked judicial estoppel to bar the EEOC from seeking any remedy on Starke's, Payne's, and Timmons's behalf. Specifically, the district court asserted that "[t]he judicial estoppel doctrine applies part-and-parcel to the EEOC, notwithstanding

the fact that it is the 'master of its own case' and does not merely stand in the shoes of the allegedly aggrieved persons for whom it seeks relief in this action under [§ 706 of Title VII]." *Id.* at 976.

On appeal, the EEOC argues that the district court abused its discretion in applying judicial estoppel to the EEOC because *the EEOC* did not assert an inconsistent position in a prior proceeding. Rather, the EEOC maintains, the past representations of Intervener Starke, Payne, and Timmons, do not bind the EEOC because, in its present posture as a plaintiff suing in its own name under § 706, "[the] EEOC does not merely stand in their shoes, and [the] EEOC's litigation does not exist simply to seek relief on their behalf." (Citing *Waffle House*, 534 U.S. at 296–98, 122 S. Ct. 754.) According to the EEOC, it "filed this litigation not for the personal benefit of any particular claimant, but for the broader public interest in enforcing Title VII and ensuring CRST maintains a workplace free from discrimination."

In response, CRST concedes that "[n]o federal appellate court has yet ruled on this issue" of whether a court can judicially estop the EEOC from bringing suit in its own name to remedy allegedly unlawful employment practices because those practices were perpetrated against an employee who herself is judicially estopped. CRST urges, nevertheless, that the district court did not abuse its discretion in judicially estopping the EEOC. Noting that judicial estoppel's chief purpose "is to protect the integrity of the judicial process," CRST avers that, "[w]hile the individual claimants in an EEOC enforcement action may not

technically be parties to the case, their prior inconsistent representations to another court pose no less of a threat to the integrity of the judicial process."

Upon review, we concur with the EEOC that the district court abused its discretion in judicially estopping the EEOC from suing *in its own name* to correct any discriminatory employment practices that CRST allegedly perpetrated against the three women. The district court's and CRST's contrary position is inconsistent with the realities of the EEOC's role as a plaintiff in its own name under § 706 and with the basic principles of the judicial estoppel doctrine.

As the Supreme Court has emphasized, "[g]iven the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its name for the purpose, among others, of securing relief for a group of aggrieved individuals." *Gen. Tel. Co.*, 446 U.S. at 324, 100 S. Ct. 1698; *see also Occidental Life Ins. Co.*, 432 U.S. at 368, 97 S. Ct. 2447 ("The EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties...."). In *Waffle House*, the Supreme Court considered "whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action alleging that the employer has violated Title I of the ... ADA."[15] 534 U.S. at 282, 122 S.

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[15] Although *Waffle House* is technically an ADA case, the Court observed at the outset of its opinion that "Congress has directed

Ct. 754. The Fourth Circuit had held that, insofar as the EEOC was suing in its own capacity under § 706 to vindicate the public interest in discrimination-free workplaces, the EEOC was limited to seeking general injunctive relief and could not also seek victim-specific relief on behalf of a victim who himself was subject to a binding arbitration agreement. *Id.* at 290, 122 S. Ct. 754. The Supreme Court reversed, concluding that such an arbitration agreement between the employer and employee did not preclude the EEOC from suing in federal court to seek victim-specific relief relating to the employee's injury. *Id.* at 298, 122 S. Ct. 754. Specifically, the Supreme Court reasoned that "[t]here is no language in the statutes or in either of these cases suggesting that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available." *Id.* at 288, 122 S. Ct. 754. Moreover, in rejecting the Fourth Circuit's conclusion that the EEOC could not recover victim-specific relief because the employee himself would be ineligible for such recovery by virtue of the binding arbitration agreement, the Supreme Court stated as follows:

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the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII ... when it is enforcing the ADA's prohibitions against employment discrimination on the basis of disability." 534 U.S. at 285, 122 S. Ct. 754 (citing 42 U.S.C. § 12117(a) (1994)). Thus, the Court determined that "the provisions of Title VII defining the EEOC's authority provide[d] the starting point for [its] analysis." *Id.* at 285–86, 122 S. Ct. 754.

> If it were true that the EEOC could prosecute its claim only with [the employee]'s consent, or if its prayer for relief could be dictated by [the employee], the court's analysis might be persuasive. But once a charge is filed, the exact opposite is true under the statute—the EEOC is in command of the process.... If ... the EEOC files suit on its own, the employee has no independent cause of action, although the employee may intervene in the EEOC's suit.... The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake.

Id. at 291, 122 S. Ct. 754.

Under *Waffle House* a court cannot judicially estop the EEOC from bringing suit in its own name to remedy employment discrimination simply because the defendant-employer happened to discriminate against an employee who, herself, was properly judicially estopped. Indeed, under Title VII, "whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." *Id.* at 296, 122 S. Ct. 754.

Accordingly, the district court abused its discretion in judicially estopping the EEOC from suing in its own name under § 706 to remedy sexual harassment that CRST allegedly perpetrated against Starke, Payne,

and Timmons, and we reverse the district court's grant of summary judgment on that ground accordingly.[16]

C. Merits of EEOC's Hostile Work–Environment Claims

1. Governing Legal Standard

The EEOC also appeals several of the district court's dispositive rulings concerning the merits of its hostile work-environment claims against CRST. "Title VII ... makes it 'an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (quoting 42 U.S.C. § 2000e–2(a)(1)). Importantly, "this language is not limited to 'economic' or 'tangible' discrimination." *Id.* (citation and internal quotations omitted). Rather, as the Supreme Court has observed, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in

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[16] Although the district court abused its discretion in judicially estopping the EEOC from suing in its own name under § 706 to remedy sexual harassment that CRST allegedly perpetrated against, *inter alia*, Payne and Timmons, we nevertheless affirm (1) the district court's grant of summary judgment, in CRST's favor, on the EEOC's hostile work-environment claim on Payne's behalf, *see infra* Part II.C.2., and (2) the district court's grant of summary judgment, in CRST's favor, based on its conclusion that, as a matter of law, CRST promptly and effectively remedied the sexual harassment once it became aware of it, as to Timmons, *see infra* Part II.C.3.

employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Id.* (citation and internal quotations omitted); *accord Carter v. Chrysler Corp.*, 173 F.3d 693, 700 (8th Cir. 1999). Thus, "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Id.* (internal citations and quotations omitted).

As we have explained,

> [h]ostile work environments created by supervisors or coworkers have the following elements in common: (1) the plaintiff belongs to a protected group; (2) the plaintiff was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and the plaintiff's protected group status; and (4) the harassment affected a term, condition, or privilege of employment. *Al–Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005). In addition, for claims of harassment by non-supervisory personnel, [the plaintiff] must show that [her] employer knew or should have known of the harassment and failed to take proper action.

Gordon v. Shafer Contracting Co., 469 F.3d 1191, 1194–95 (8th Cir. 2006). Critically, "[CRST] cannot be vicariously liable for sexual harassment [perpetrated] by non-supervisory coworkers." *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010).

> On the other hand, if the harassment was committed by an employee who supervised [the plaintiff], [CRST] as her employer is vicariously liable for the harassment unless it can establish the affirmative defense defined in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) [(hereinafter, the "*Ellerth–Faragher* Defense")].

Joens v. John Morrell & Co., 354 F.3d 938, 940 (8th Cir. 2004). Under the *Ellerth–Faragher* Defense, CRST may avoid vicarious liability for a supervisory employee's harassment if it satisfies "'two necessary elements: (a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior[ ] and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.'" *Weger v. City of Ladue*, 500 F.3d 710, 718 (8th Cir. 2007) (quoting *Williams v. Mo. Dep't of Mental Health*, 407 F.3d 972, 976 (8th Cir. 2005)).

Thus, we must determine, as a threshold matter, whether CRST's Lead Drivers served as supervisors for CRST's trainees or were merely the trainees' coworkers. *See Alvarez*, 626 F.3d at 419. The district court determined that Lead Drivers did not serve as the trainees' supervisors. In contrast, the EEOC maintained before the district court, as it does here on appeal, that a CRST Lead Driver is a "supervisor" in

every practical sense of the word. Specifically, the EEOC avers that "CRST gives [Lead Drivers] virtually unchecked authority and control over all aspects of a trainee's daily activities, as well as authority to recommend whether a trainee is ready for full-driver status, and their recommendations are virtually always followed." CRST counters that "the functions and powers that [the] EEOC attributes to [L]ead [D]rivers are no greater than those of the team leaders and foreman that this court has held are not supervisors."

Applying our precedent, we agree with the district court that CRST's Lead Driver is not a supervisory employee. Therefore, CRST is not vicariously liable for any harassment that its Lead Drivers allegedly perpetrated against female trainees. "[T]o be considered a supervisor, 'the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.' "*Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (quoting *Joens*, 354 F.3d at 940). It is undisputed that none of CRST's Lead Drivers wielded any such power. On the contrary, the record reflects that, at best, CRST's Lead Drivers could only (1) dictate minor aspects of the trainees' work experience, such as scheduling rest stops during the team drive and (2) issuing a non-binding recommendation to superiors at the training program's conclusion concerning whether CRST should upgrade the trainee to full-driver status.

Under our case law, neither of these prerogatives makes a Lead Driver the trainee's "supervisor."

First, our circuit has held that "[t]he fact that an alleged harasser may have been a 'team leader' with the authority to assign employees to particular tasks will not be enough to make that person a supervisor." *Merritt v. Albemarle Corp.*, 496 F.3d 880, 883 (8th Cir. 2007) (quotations and citation omitted). Thus, in *Weyers*, we declined to designate a "team leader" a supervisor because, "[a]lthough [the alleged harasser] had the authority as team leader to assign employees to particular tasks, he could not reassign them to significantly different duties." *Weyers*, 359 F.3d at 1057. Similarly, in *Merritt*, we refused to recognize the allegedly harassing "reliability technician," 496 F.3d at 881, as a supervisor because "[h]is authority was restricted to assigning [the plaintiff] to work on various tasks that were part of her work duties," *id.* at 884. The same holds true here. The EEOC has adduced no evidence suggesting that a CRST Lead Driver possessed the power to do anything more than assign a trainee to specific tasks already within that trainee's normal, day-to-day duties.

Second, CRST's reliance, in part, on a Lead Driver's evaluation of a trainee's performance to decide whether to promote that trainee to full-driver status is insufficient to render a Lead Driver a supervisor. Although the Supreme Court declined, in *Ellerth* and *Faragher*, to "answer the question, 'who is a supervisor?,'" *Joens*, 354 F.3d at 940, it did observe that a "tangible employment decision ... may be subject to review by higher level supervisors," *Ellerth*, 524 U.S.

at 762, 118 S. Ct. 2257. Indeed, the EEOC relies on this very observation in *Ellerth* to support its own assertion that "[i]t is immaterial that CRST may, on occasion, not follow a trainer's recommendation." However, the EEOC's argument in this regard fails for two reasons. First, aside from its bare assertion, the EEOC offers no evidence that CRST simply "rubber stamped" its Lead Drivers' recommendations. *See Staub v. Proctor Hosp.*, — U.S. ——, 131 S. Ct. 1186, 1194, 179 L. Ed. 2d 144 (2011) (holding that if a non-decisionmaker performs an act motivated by a discriminatory bias that is intended to cause, and that does proximately cause, an adverse employment action, then the employer has "cat's paw" liability). Second, we have concluded, under almost identical circumstances, that a coworker's authority to make mere *recommendations* or evaluations to a superior about tangible employment decisions pertaining to a fellow employee does not constructively promote that coworker to a supervisor for purposes of vicarious Title VII liability. *See, e.g., Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 851 (8th Cir. 2005) (holding that a harassing foreman was merely his victim's coworker, and not the victim's supervisor, because the foreman's own supervisor possessed the authority to hire, fire, and promote the laborers, and "although [the foreman's supervisor] may have consulted with [the harassing foreman] on such matters, the record [was] clear that [the harassing foreman] lacked any such authority"); *Weyers*, 359 F.3d at 1057 ("While it is true that [the alleged harasser] signed at least three of [the plaintiff's] initial performance evaluations and that [the supervisor] acknowledged that he had based his decision to

terminate [the plaintiff] at least in part on [the plaintiff's] job[-]evaluation scores, [the alleged harasser] himself did not have the authority to take tangible employment action against [the plaintiff].").

Finally, we reject the EEOC's suggestion that, "[a]t a minimum, the authority CRST vests in its trainers creates a basis for liability under the apparent authority doctrine." This court has consistently affirmed that a harassing coworker's "apparent authority would be an insufficient basis to support a finding of supervisor status." *Weyers*, 359 F.3d at 1057 n.7; *accord Cheshewalla*, 415 F.3d at 851 (reaffirming that "[an employee's] belief that [her harassing coworker] possessed the authority of a supervisor does not alter our conclusion" that the harasser is a coworker nonetheless (citing *Weyers*, 359 F.3d at 1057 n.7)).

Thus, we concur with the district court that CRST's Lead Drivers were their trainees' coworkers, not their supervisors. Consequently, CRST cannot be vicariously liable for any sexual harassment in which its Lead Drivers engaged, and the *Ellerth–Faragher* Defense is inapplicable to the instant case. *See Alvarez*, 626 F.3d at 419.

In order to withstand summary judgment on its hostile work-environment claims against CRST, the EEOC must create genuine issues of material fact as to the following elements regarding each allegedly aggrieved female trucker:

> "(1) [that she belongs to] a protected group; (2) [that she suffered] unwelcome harassment; (3)

> [that there was] a causal nexus between the harassment and her membership in the protected group; (4) that the harassment affected a term, condition, or privilege of [her] employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action."

Sheriff v. Midwest Health Partners, P.C., 619 F.3d 923, 929 (8th Cir. 2010) (alterations in original) (quoting *Carter*, 173 F.3d at 700). Given these elements, we next address the district court's summary-judgment rulings against the EEOC on its hostile work environment claims.

2. The Severity or Pervasiveness of Certain Harassment

The district court granted CRST summary judgment on the EEOC's hostile work-environment claims on behalf of three women,[17] concluding that, as a matter of law, each alleged harassment that was neither sufficiently severe nor pervasive to support a hostile work-environment claim. The district granted CRST summary judgment on the EEOC's claims on behalf of 11 additional women,[18] again citing, *inter alia*,[19] insufficient severity or pervasiveness as a

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[17] Victoria Holmes, January Jackson, and Tillie Jones.

[18] Dorothy Dockery, Debra Hindes, Tracy Hughes, Patricia Marzett, Virginia Mason, Lucinda McBlair, Sherry O'Donnell, Christina Payne, Peggy Pratt, Jonne Shepler, and Linda Skaggs.

[19] The district court alternatively concluded, as a matter of law, that nine of these 11 additional women—all except Payne and

matter of law. The EEOC appeals these rulings, maintaining that the summary-judgment record contains enough evidence to create a fact question regarding the severity or pervasiveness of the harassment that each woman suffered.

A district court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "We review *de novo* the district court's grant of summary judgment, viewing the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Mayer v. Countrywide Home Loans*, 647 F.3d 789, 791 (8th Cir. 2011).

On each female trucker's behalf, the EEOC must create a genuine issue of material fact concerning whether "the harassment affected a term, condition, or privilege of [her] employment." *Carter*, 173 F.3d at 700. "Such discrimination extends beyond terms and conditions in the 'narrow contractual sense' and includes discriminatory harassment *so severe or pervasive* as to alter the conditions of employment and create a hostile working environment." *Id.* (emphasis added) (citing *Faragher*, 524 U.S. at 786, 118 S. Ct. 2275; *Meritor Sav. Bank, FSB*, 477 U.S. at 67, 106 S. Ct.

Skaggs—either (a) failed to timely and properly notify CRST of the harassment that they suffered, thereby depriving CRST of the opportunity to remedy it, or (b) did timely and properly notify CRST of the harassment, but the company promptly and effectively remedied it.

2399). "There can be no doubt federal harassment standards are demanding.... Indeed, the Supreme Court has 'made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment.'" *Al–Zubaidy*, 406 F.3d at 1038 (quoting *Faragher*, 524 U.S. at 788, 118 S. Ct. 2275) (internal citation omitted). Only "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [is] Title VII violated." *Harris*, 510 U.S. at 21, 114 S. Ct. 367 (internal quotations and citations omitted). Conversely, "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id.*

"A number of factors are relevant in assessing the magnitude of harassment, including the frequency and severity of the discriminatory conduct, whether it is physically threatening or humiliating or only an offensive utterance, [and] whether it unreasonably interferes with the employee's work performance...." *Carter*, 173 F.3d at 702. We also consider a harassment victim's "physical proximity to the harasser[ ] and the presence or absence of other people." *Id.* (internal citations omitted). Proximity and the absence of others are relevant here given the confined quarters and remote setting in which CRST's trainees worked with their Lead Drivers. "Once there is evidence of improper conduct and subjective offense, the

determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." *Sheriff*, 619 F.3d at 931.

Applying these standards we conclude that, except as to two women—Sherry O'Donnell and Tillie Jones—the district court did not err in granting CRST summary judgment after determining that the women complained of harassment that was neither sufficiently severe nor pervasive. The record reveals complaints about their Lead Drivers' poor personal hygiene,[20] boasting about past sexual exploits, sporadic remarks of sexual vulgarity, and highly offensive but isolated instances of propositioning for sex. None of the relevant factors listed above, including the women's "physical proximity to [their] harasser[s] and the presence or absence of other people," *Carter*, 173 F.3d at 702, meet the applicable standard that the alleged harassment was so severe or pervasive that it "alter[ed] the conditions of the [women's] employment." *Harris*, 510 U.S. at 21, 114 S. Ct. 367 (internal quotations and citations omitted). Regarding the Lead Drivers' poor hygienic practices, we have noted that "Title VII ... is not a general civility code for the American workplace." *Wilkie v. Dep't of Health & Human Servs.*, 638 F.3d 944, 953 (8th Cir. 2011) (quotations and citation omitted); *accord Faragher*, 524 U.S. at 788, 118 S. Ct. 2275. Although a Lead Driver's

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[20] By way of example, several women complained that, to minimize stops while in transit, their male Lead Drivers habitually urinated in plastic bottles with no regard for their female trainee, who often heard or even smelled the foul activity.

poor hygiene undoubtedly made for an unpleasant work environment, this "[m]erely rude or unpleasant conduct is insufficient to support a claim" for hostile work environment. *Id.* (quotations and citation omitted). As for the boasting about past sexual exploits and sporadic, sexually vulgar remarks, a de novo review reveals that they mostly constituted "mere offensive utterance[s]," *Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1127 (8th Cir. 2000) (quotations and citation omitted), and we have cautioned that "[s]poradic or casual comments are unlikely to support a hostile environment claim," *Carter*, 173 F.3d at 702. With respect to the isolated propositioning, this court and the Supreme Court have stated that "'[m]ore than a few isolated incidents are required'" to support a hostile work-environment claim. *Clearwater*, 231 F.3d at 1127 (quoting *Meritor Sav. Bank*, 477 U.S. at 67, 106 S. Ct. 2399). Consequently, the district court did not err in concluding, as a matter of law, that 12 women did not suffer sufficiently severe or pervasive harassment to survive summary judgment.

The EEOC did, however, establish material issues of fact regarding the harassment that O'Donnell and Jones allegedly suffered. We hold that the district court erred in concluding, as a matter of law, that the harassment they suffered was insufficiently severe or pervasive. O'Donnell testified in her deposition that, among others, co-driver Anthony Sears subjected her to persistent sexual harassment during the seven days that she spent with him over the road. Specifically, O'Donnell testified that, over the course of that seven-day trip, Sears (1) asked her, on "three to five"

occasions, to drive naked; (2) refused O'Donnell's repeated requests to exit at a truck stop so she could go to the bathroom, ordering her to urinate in a parking lot instead; and (3) in a culminating incident, grabbed O'Donnell's face while she was driving and began screaming that "all he wanted was a girlfriend." Regarding this third incident, O'Donnell testified that Sears grabbed her face so vigorously that it caused one of her teeth to lacerate her lip. Viewing all facts and drawing all inferences therefrom in the light most favorable to the EEOC, as we must, *Mayer*, 647 F.3d at 791, this testimony creates a genuine fact issue as to the severity of the harassment that O'Donnell allegedly suffered. Given that Sears allegedly perpetrated all of these acts in a week's time, the conduct was frequent. *See Carter*, 173 F.3d at 702. Sears's directive that O'Donnell publicly urinate in a parking lot is a patent attempt at humiliation. *See id.* (citation omitted). Moreover, Sears's act of grabbing O'Donnell's face, was, by its very nature, "physically threatening." *Id.* Finally, upon assessing these characteristics of Sears's alleged conduct in light of O'Donnell's physical proximity to Sears and the absence of other people, we must conclude that the EEOC has produced enough evidence of severity of O'Donnell's alleged harassment to make it a question for the jury. *See Sheriff*, 619 F.3d at 931 ("Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury.").[21]

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[21] Still, as we explain in Part II.C.3 *infra*, the district court did not err in granting summary judgment on the EEOC's claim on

The district court erred in concluding, as a matter of law, that Tillie Jones suffered harassment that was neither sufficiently severe nor pervasive. Jones testified that, on three or four occasions over the course of a two-week training trip, her Lead Driver, James Simmons, entered the cab wearing only his underwear and rubbed the back of her head, despite repeated requests by Jones that he stop. Jones also testified that, "everyday," Simmons entered the cab in his underwear while she was driving. Additionally, according to Jones, Simmons called her "his bitch" five or six times, including on one occasion when, in response to Jones's complaints about his slovenly habits, he ordered Jones to clean up the truck, declaring "that's what you're on the truck for, you're my bitch. I ain't your bitch. Shut up and clean it up." Finally, Jones testified that, like many of CRST's Lead Drivers, Simmons routinely urinated in plastic bottles and ziplock bags while in transit. However, Jones testified that Simmons would leave his urine receptacles about the truck's cab and that when Jones implored Simmons to gather them, Simmons ordered her to "shut up and clean it up." No overt physical threat or contact was present, but the evidence suffices to create a genuine issue of material fact concerning the severity or pervasiveness of the harassment which the EEOC alleges that Jones suffered.

In sum, we affirm the district court's summary judgment, in CRST's favor, on the EEOC's hostile

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O'Donnell's behalf because CRST took prompt and effective remedial action when O'Donnell complained about Sears's conduct.

work-environment claims on behalf of 12 women,[22] concurring in the district court's conclusion that, as a matter of law, the alleged harassment was neither sufficiently severe nor pervasive. However, we reverse the district court's grant of summary judgment as to the EEOC's claims on behalf of Tillie Jones. We conclude that the EEOC created a genuine issue of material fact as to the severity or pervasiveness of the harassment that Jones allegedly suffered. Finally, although we also conclude that the EEOC has created a genuine fact issue as to the severity or pervasiveness of the harassment that Sherry O'Donnell allegedly suffered, for the reasons stated in Part II.C.3. *infra*, we affirm the district court's grant of summary judgment on the EEOC's claims on her behalf.

3. CRST's Notice and/or Remedying of the Alleged Harassment

The EEOC also appeals the district court's grant of summary judgment on its claims as to 34 women[23] who,

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[22] Dorothy Dockery, Debra Hindes, Victoria Holmes, Tracy Hughes, January Jackson, Patricia Marzett, Virginia Mason, Lucinda McBlair, Christina Payne, Peggy Pratt, Jonne Shepler, and Linda Skaggs.

[23] Antoinette Baldwin, Bonnie Batyik, Mary Beaton, Bethany Broeker, Kim Chisholm, Catherine Coronado, Samantha Cunningham, Denise Desonier, Dorothy Dockery, Maybi Fernandez-Fabre, Catherine (Granofsky)-Fletcher, Debra Hindes, Tracy Hughes, January Jackson, Ginger Laudermilk, Patricia Marzett, Virginia Mason, Lucinda McBlair, Verona McIver, Bonnie Moesch, Sherry O'Donnell, Tammi Pile, Sharon Pinchem, Peggy Pratt, Danette Quintanilla, Kathleen Seymour, Faith Shadden, Jonne Shepler, Mary "Emily" Smith, Jennifer

according to the district court, either (1) allege harassment that CRST neither knew nor should have known about or (2) allege harassment that CRST, upon being notified of, promptly and effectively remedied. Specifically, the district court granted summary judgment on the EEOC's claims concerning 11 women, *see supra* n.5, and some days later granted summary judgment as to 22 more. Additionally, in its order granting CRST summary judgment on the EEOC's claims on behalf of January Jackson for insufficient severity or pervasiveness, the district court alternatively concluded that CRST neither knew nor should have known about her harassment.

We have already affirmed the district court's grant of summary judgment affecting nine[24] of these 34 women based on its alternative conclusion that their alleged harassment was not sufficiently severe or pervasive. *See supra* Part II.C.2. Therefore, we need not address whether CRST knew or should have known about the harassment that those nine women suffered. *See Alvarez*, 626 F.3d at 419 ("When an employee complains about inappropriate conduct that does not rise to the level of a violation of law, ... there is no liability for a failure to respond.").

Susson, Robin Timmons, Rachel Tucker, Diana Vance, and Betsy Ybarra.

[24] Dorothy Dockery, Debra Hindes, Tracy Hughes, January Jackson, Patricia Marzett, Virginia Mason, Lucinda McBlair, Peggy Pratt, and Jonne Shepler.

As to the remaining 25 women,[25] we conducted a de novo review of all record evidence. Based on that review we hold that the EEOC failed, as a matter of law, to investigate and/or conciliate its claims on behalf of four of them—Bonnie Batyik, Bethany Broeker, Verona McIver, and Diana Vance. Specifically, each woman complains of harassment that CRST allegedly perpetrated after the filing of the instant lawsuit on September 27, 2007.[26] We reserve the right to affirm a district court's grant of summary judgment on any ground that the summary-judgment record supports. *W3i Mobile, LLC v. Westchester Fire Ins. Co.*, 632 F.3d

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[25] Antoinette Baldwin, Bonnie Batyik, Mary Beaton, Bethany Broeker, Kim Chisholm, Catherine Coronado, Samantha Cunningham, Denise Desonier, Maybi Fernandez-Fabre, Catherine (Granofsky)-Fletcher, Ginger Laudermilk, Verona McIver, Bonnie Moesch, Sherry O'Donnell, Tammi Pile, Sharon Pinchem, Danette Quintanilla, Kathleen Seymour, Faith Shadden, Mary "Emily" Smith, Jennifer Susson, Robin Timmons, Rachel Tucker, Diana Vance, and Betsy Ybarra.

[26] In her deposition, Batyik admitted that she did not even begin working at CRST until January 24, 2008, and alleges that Lead Driver David Buckner sexually harassed her for four weeks from January 27, 2008, until February 25, 2008. Similarly, Broeker concedes she did not commence employment with CRST until August 4, 2008, and that the EEOC's claims on her behalf stem from harassment that she allegedly suffered at the hands of Lead Driver Sean Pourfahm, from August 13, 2008, until August 15, 2008. McIver began her second stint of employment with CRST in November 2007 and alleges that Lead Driver Henry Nei sexually harassed her from February 15, 2008, until February 22, 2008. Finally, Diana Vance began her employment on June 11, 2008, and alleges sporadic harassment throughout her employment until her termination on August 6, 2008.

432, 436 (8th Cir. 2011). Accordingly, as to these four women, we will affirm the district court's grant of summary judgment on the alternative ground that the EEOC failed to discharge its pre-suit duties under Title VII to investigate and conciliate these claims, as they did not even accrue until after the EEOC had instituted the action. *See supra* Part II.A.2.

Regarding the remaining 21 women, because the women's Lead Drivers and co-drivers were their coworkers rather than their supervisors, *see supra* Part II.C.1., the EEOC must, as part of its burden on summary judgment, create a genuine issue of material fact as to whether CRST "[(1)] knew or should have known of the harassment *and* [(2)] failed to take prompt and effective remedial action." *Carter*, 173 F.3d at 693 (emphasis added). Stated another way, "[CRST] may be directly liable for its employees' actions that violate Title VII if the company knows or should have known of the conduct, *unless* it can show that it took immediate action and appropriate corrective action." *Alvarez*, 626 F.3d at 419 (emphasis added) (quotations and citation omitted). Regarding the 25 women in question, our de novo review of the EEOC's claims concerning each woman confirms the district court's conclusion that no fact issue remained because (1) CRST neither knew nor should have known about the alleged harassment to remedy it because the woman failed to report it soon enough, or at all; or (2) the woman timely reported the harassment, and CRST promptly and effectively remedied it.

With respect to CRST's knowledge, we have stated that either an employer's actual or constructive notice

of ongoing coworker-on-coworker harassment may subject the employer to direct liability for that harassment unless the employer takes prompt corrective action. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 801 (8th Cir. 2009). "An employer has actual notice of harassment when sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it." *Id.* at 802 (citation omitted). Simply put, "[i]n the context of sexual harassment claims, '[a]ctual notice is established by proof that management *knew* of the harassment.'" *Id.* (second alteration in original) (quoting *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003)). Constructive notice is established in the following circumstances: "[(1)] where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or [(2)] where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it." *Id.* (quoting *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 294 (3d Cir. 1999)).

Of the remaining 21 women, we conclude, as a matter of law, that CRST lacked *actual* notice as to ten of them.[27] Specifically, each of these ten women either

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[27] Antoinette Baldwin, Kim Chisholm, Catherine Coronado, Maybi Fernandez–Fabre, Catherine (Granofsky)–Fletcher, Bonnie Moesch, Tammi Pile, Sharon Pinchem, Rachel Tucker, and Betsy Ybarra.

never reported the alleged sexual harassment to CRST or reported it too late to afford CRST a reasonable opportunity to promptly and effectively address it. We note that, "[i]n some cases, ... an employee may be excused for a delay in reporting harassment, if the employee can demonstrate a truly credible threat of retaliation." *Alvarez*, 626 F.3d at 422 (quotations and citation omitted). However, a thorough review of each woman's deposition testimony confirms that the EEOC has failed to demonstrate that any of these ten women faced such a credible threat.[28] Thus, CRST lacked actual notice because the EEOC has produced no evidence "that management *knew* of the harassment." *Sandoval*, 578 F.3d at 802 (quotations and citation omitted).

Furthermore, on the present record, we must also conclude, as a matter of law, that CRST lacked constructive knowledge of any harassment that the ten women allegedly suffered. The EEOC's argument to the contrary is linked to its separate contention that the district court abused its discretion in excluding

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[28] In fact, the only woman before us whose record demonstrates such a credible threat is Bonnie Batyik, who testified in her deposition that her harasser, Lead Driver Phillip Buckner, threatened that "if [she] told Bill, the dispatch, or anyone, basically, that [the harassment] would go to another level and that it wouldn't be good for [her] so [she] should keep [her] mouth shut." This is the type of "credible threat" that we recognize as excusing an employee's failure to promptly report harassment by a coworker. Nevertheless, as already noted, summary judgment on the EEOC's claims concerning Batyik is appropriate because the EEOC failed to investigate and conciliate them as Title VII requires. *See supra* Part II.C.3.

documentary evidence pertaining to the 99 women for whom the district court precluded the EEOC from seeking relief. Specifically, as a discovery sanction for the EEOC's failure to present these 99 women to CRST for deposition, the district court—as it had forewarned in a prior order—precluded each woman from testifying at trial and barred the EEOC from seeking relief on her behalf in the instant case. However, in opposing CRST's motion for summary judgment concerning the company's constructive notice of harassment, the EEOC included records of these 99 women's harassment complaints to CRST, their Qualcomm messages, and other documentary evidence. CRST moved to strike this evidence from the summary-judgment record, citing the district court's discovery sanction. The district court subsequently granted the motion, concurring with CRST that permitting the EEOC to introduce evidence of the 99 women's complaints would amount to an "end-run" around its discovery sanction precluding the EEOC's relief on their behalf. *CRST Van Expedited, Inc.*, 2009 WL 2524402, at *16. On appeal, the EEOC maintains that (1) the district court abused its discretion by excluding this evidence pursuant to its prior discovery sanction, and (2) should we reverse the district court and order the inclusion of the evidence in the summary-judgment record, that we also reverse the district court's grant of summary judgment in light of the new evidence—evidence that the EEOC avers is relevant to whether CRST possessed constructive knowledge of allegedly rampant harassment in its training program. *See Sandoval*, 578 F.3d at 802–03 (concluding that, in light of plaintiffs' allegations that

the employer "was aware of nearly one hundred similar [sexual-harassment] complaints made during the time plaintiffs were employed," "the district court erred in disregarding," on summary judgment, "the evidence of widespread sexual harassment," as such evidence is "highly relevant to prove the sexual harassment was severe and pervasive and that [the employer] had constructive notice").

Although we review the district court's grant of summary judgment de novo, *Mayer*, 647 F.3d at 791, "[w]e review the district court's imposition of discovery sanctions for abuse of discretion," *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 898 (8th Cir. 2009) (quotations and citation omitted). The undisputed record reflects that, after protracted discovery, the district court ordered the EEOC, by a certain date, to present for deposition all allegedly aggrieved women. Moreover, the district court directed that "[i]f the EEOC fails to make a woman available, as a discovery sanction *the court will not permit her to testify at trial* and will bar the EEOC from seeking relief on her behalf in this case." *EEOC v. CRST Van Expedited, Inc.*, 257 F.R.D. 513, 519 (N.D. Iowa 2008) (emphasis added). The EEOC concedes that it failed to present for deposition the 99 women. In response to a party's failure to obey such a discovery order, the Federal Rules of Civil Procedure plainly authorizes a district court to "prohibit the disobedient party from supporting or opposing designated claims or defenses, *or from introducing designated matters in evidence.*" Fed.R.Civ.P. 37(b)(2)(A)(ii) (emphasis added). Notably, the EEOC does *not* appeal the propriety of the

discovery sanction *itself*, but only the district court's enforcement of it. Citing our decision in *Sandoval*, 578 F.3d at 802–03, the EEOC emphasizes the excluded evidence's purported relevance to the question of whether CRST was on constructive notice of the alleged harassment. However, the EEOC offers no direct support for its contention that, by enforcing its own discovery sanction—whose propriety the EEOC does *not* appeal—the district court abused its discretion. Likewise, on this record, we find no evidence that the district court abused its discretion by enforcing its own valid discovery sanction.

Consequently, in granting summary judgment based on its conclusion that, as a matter of law, CRST lacked constructive notice as to the ten women presently at issue, the district court did not premise its ruling on an incomplete summary-judgment record. Moreover, our de novo review of this record reveals no fact issue as to CRST's constructive notice. Specifically, the EEOC has failed to adduce sufficient evidence to create a fact issue as to whether "the harassment was so broad in scope, and so permeated the workplace, *that it must have come to the attention of someone authorized to do something about it.*" *Id.* at 802 (quotations and citation omitted).

With respect to the remaining 11 women,[29] we affirm the district court's grant of summary judgment

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[29] Mary Beaton, Samantha Cunningham, Denise Desonier, Ginger Laudermilk, Sherry O'Donnell, Danette Quintanilla, Kathleen M. Seymour, Faith Shadden, Mary Smith, Jennifer Susson, and Robin Timmons.

based on its conclusion that, as a matter of law, CRST promptly and effectively remedied the sexual harassment once it became aware of it. "If an employer responds to harassment with prompt remedial action calculated to end it, then the employer is not liable for the harassment." *Alvarez*, 626 F.3d at 421. In assessing the reasonableness of an employer's remedial action, the factors to be considered "include the amount of time that elapsed between the notice and remedial action, the options available to the employer, ... and whether or not the measures ended the harassment." *Id.* (alteration in original, quotations and citation omitted). After reviewing the record pertaining to these 11 women in the light most favorable to the EEOC, we hold that CRST effectively and promptly remedied the harassment once the women reported it.

The record reflects that CRST addressed reported harassment by (1) removing the woman from the truck as soon as practicable, arranging overnight lodging at a motel and subsequent transportation to a CRST terminal at the company's expense; (2) requesting a written statement from the woman; (3) relieving the woman from future assignments with the alleged harasser; and (4) reprimanding the alleged harasser and barring him from team-driving with women indefinitely. These actions, not necessarily in combination, constitute the type of prompt and effective remedial action that our precedents prescribe. When considering the "[remedial] options available to the employer," we have included "employee training sessions, *transferring the harassers, written warnings, reprimands in personnel files,* or termination," as

acceptable options, depending on the particulars of the case. *Carter*, 173 F.3d at 702 (emphasis added). In each of the 11 women's cases, CRST removed the woman from the alleged harasser's truck within 24 hours of the harassment being reported, and often much sooner. *See Alvarez*, 626 F.3d at 421 ("Employees often must tolerate some delay ... so that an employer can gauge the credibility of the complainant and the seriousness of the situation.") (quotations and citation omitted). Moreover, each woman confirmed that they did not suffer any harassment subsequent to their removal.

Accordingly, we affirm the district court's summary judgment as to the remaining 11 women, concurring in its conclusion that, as a matter of law, CRST promptly and effectively remedied any alleged harassment that the women reported.

D. Intervener Peeples's Claims

Peeples appeals the district court's grant of summary judgment to CRST on her hostile work-environment and retaliation claims under Title VII, as well as her state-law claim under the Iowa Civil Rights Act (ICRA). "Consistent with our precedent, the district court concluded that the [ICRA] is interpreted in the same way as Title VII." *Alvarez*, 626 F.3d at 416 n.2. The district court correctly concluded that Peeples's Title VII and ICRA hostile work-environment claims failed as a matter of law "because she did not report the sexual harassment to CRST in a timely manner." *CRST Van Expedited, Inc.*, 2009 WL 1586193, at *15. Peeples delayed reporting the alleged sexual harassment until after she voluntarily left her harasser's truck. Additionally, for the reasons

stated in Part II.C.3 *supra*, the district court properly concluded that there is insufficient evidence in the record to create a fact issue concerning CRST's constructive notice.

We also conclude that the district court *did not* err in granting summary judgment on Peeples's Title VII and ICRA retaliation claims. "This court analyzes ICRA retaliation claims under the same method as federal retaliation claims." *Young–Losee v. Graphic Packaging Int'l, Inc.*, 631 F.3d 909, 912 (8th Cir. 2011) (quotations and citation omitted). The district court concluded that "[a] reasonable jury could not find a causal connection between Ms. Peeples's complaint about [her harasser's] conduct and any adverse employment action." *CRST Van Expedited, Inc.*, 2009 WL 1586193, at *15. We agree with the district court's conclusion. "Title VII makes it unlawful for an employer to discriminate against an employee because she has 'opposed any practice made an unlawful employment practice,' or has made a charge or participated in an investigation or proceeding under the statute." *Alvarez*, 626 F.3d at 416 (quoting 42 U.S.C. § 2000e–3(a)). Specifically, Peeples must demonstrate that the protected conduct in which she engaged "was a determinative factor in the employer's materially adverse employment action." *Id.* "Because the factual record was fully developed in connection with the motion for summary judgment, we address directly whether [Peeples] has presented a genuine issue of material fact for trial on the ultimate question of discrimination *vel non*." *Id.* Thus, "[t]he key question here is whether [Peeples] presented sufficient evidence

to support a conclusion that [CRST's] proffered reason for [terminating] her was pretext for a retaliatory motive." *Id.*

Peeples failed to establish a fact issue that CRST's proffered reason for her termination was pretextual. CRST asserts that it discharged Peeples because newly diagnosed cervical cancer prevented her from working. The undisputed record reflects that she was unable to operate her truck under CRST's demanding team-driving regimen because of her frequent cervical bleeding and subsequent chemotherapy and radiation treatments. As support for her claim that CRST's reason was pretextual, she relies on a comment by Robin Knight, the replacement Lead Driver, that referred to Peeples as "his problem child." Additionally, Peeples relies on the temporal proximity of her discharge to her complaint, noting that CRST terminated her approximately one month after her complaint. This evidence supports mere speculation not a reasonable conclusion of pretext. With respect to the temporal proximity, we note that within a few days of Peeples leaving her harasser's truck, CRST granted her request for a female Lead Driver and immediately put her back out on the road. It is undisputed that on September 20, 2005, a Texas doctor issued a second opinion that her proper diagnosis was cervical cancer.

On these facts, the district court properly concluded that a reasonable jury could not conclude that CRST's proffered reason for terminating Peeples's employment was pretextual. Accordingly, we affirm the district court's grant of summary judgment on her Title VII and ICRA retaliation claims.

E. Attorneys' Fees

Finally, the EEOC contends on appeal that the district court abused its discretion by awarding CRST $4,467,442.90 in attorneys' fees and expenses, pursuant to 42 U.S.C. § 2000e–5(k) and 28 U.S.C. § 1920. "A *prevailing* defendant in a discrimination suit under Title VII of the Civil Rights Act of 1964 may recover attorneys' fees if the plaintiff's case was frivolous, unreasonable, or without foundation." *EEOC v. Kenneth Balk & Assocs., Inc.*, 813 F.2d 197, 198 (8th Cir. 1987) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421–22, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)). "[W]e will grant prevailing party status to a Title VII defendant only in very narrow circumstances." *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994). In light of our reversals of a couple of the district court's summary-judgment orders, CRST is no longer a "prevailing" defendant because the EEOC still asserts live claims against it. *See id.* ("Where there are disputed issues of fact, it is necessarily impossible to prove that a plaintiff's case is meritless shy of a full-blown trial on the merits which might reveal that the plaintiff's case was 'without foundation.' "). Accordingly, we will vacate, without prejudice, the district court's award of attorneys' fees and expenses pursuant to 42 U.S.C. § 2000e–5(k).

III. Conclusion

Based on the foregoing, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. Specifically, we reverse the district court's grant of summary judgment on the EEOC's

claims as to Monika Starke because the EEOC, suing as a plaintiff in its own name under § 706, may not be judicially estopped because of Starke's independent conduct.[30] Additionally, we reverse the district court's grant of summary judgment on the EEOC's claims on behalf of Tillie Jones because the EEOC has produced sufficient evidence to create a genuine fact issue as to the severity or pervasiveness of harassment that she allegedly suffered. Finally, we vacate, without prejudice, the district court's award of attorneys' fees to CRST because, in light of these aforementioned rulings, CRST is no longer a "prevailing" defendant under 42 U.S.C. § 2000e–5(k). We affirm the remainder of the district court's orders and remand for further proceedings consistent with this opinion.

MURPHY, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent from the majority's conclusion that the EEOC failed to fulfill its litigation prerequisites in this case and the resulting dismissal of trial worthy sexual harassment claims. The majority imposes a new requirement that the EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing a class claim. This rule places unprecedented obligations on the EEOC and in effect rewards CRST for withholding information from the Commission. In addition I dissent from the holding that CRST's lead drivers are not

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[30] See *supra* n.16 regarding our ultimate affirmance of the district court's grant of summary judgment to CRST as to Payne's and Timmons's claims.

supervisors of the women trainees assigned to their long haul trips. In other respects I join in the majority opinion.

The EEOC was drawn into this case by Monika Starke's charge that she was sexually harassed while employed by CRST. The Commission then asked CRST "whether any other individual has complained" about sexual harassment at the company. Although many women had reported harassment by trainers or codrivers during long haul trips, CRST furnished to the Commission only two names. The EEOC eventually discovered that several hundred women employees claimed severe sexual harassment by CRST male trainers or driving partners during extended over the road trips. Their allegations against the truck drivers included claims of sexual propositioning, sexual assault, and rape. As the EEOC's investigation continued, it learned that CRST had originally taken minimal action in response to the women's reports of harassment.

During the course of the Title VII prelitigation process, the EEOC put CRST on notice that it was investigating a class of women employees and requested the company's help in identifying class members. *See* 29 C.F.R. § 1601.15 (explaining EEOC's investigative authority). The Commission informed CRST that it had found "reasonable cause to believe that [the company had] subjected a class of employees and prospective employees to sexual harassment." *See* 42 U.S.C. § 2000e–5(b) (directing Commission to issue reasonable cause determination after investigation). Subsequently the EEOC gave CRST an opportunity to achieve voluntary compliance despite the company's

late response to the Commission's invitation to conciliate. *See id.* (stating that the Commission "shall endeavor to eliminate any ... alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion"). During the conciliation process the EEOC informed CRST that it did not have access to the number of class members or their names and needed the company's help to identify these individuals. CRST rejected this proposal, responding that the damage amount sought by Monika Starke made it "confident that conciliation will not result in a resolution of this matter." Thus unable to obtain cooperation from CRST, the EEOC proceeded with this lawsuit.

Neither Title VII nor our prior cases require that the EEOC conduct its presuit obligations for each complainant individually when litigating a class claim. Rather, we have required that the EEOC perform these duties for each ***type*** of Title VII violation alleged by the complainant. *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668–69 (8th Cir. 1992). Other circuit courts have similarly held that the "nature and extent" of the EEOC's investigation is beyond the scope of judicial review and that the EEOC need not separately conciliate individual class members when pursuing a class based sexual discrimination claim. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100–01 (6th Cir. 1984); *see also EEOC v. Rhone–Poulenc, Inc.*, 876 F.2d 16, 17 (3d Cir. 1989) (noting in ADEA case that EEOC need not conciliate individual class members); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1237, 1245–46 (M.D. Ala. 2001) (noting that "[w]hat matters is

that EEOC served [the employer] notice that it was investigating possible discrimination against a class of women" and that the EEOC need not "conciliate each individual's Title VII claim separately").

The cases relied on by the majority are not to the contrary. They require only that the EEOC give the employer notice during the administrative process of the nature and scope of the claim, not of the names of each potential class member. For example, in *EEOC v. Jillian's of Indianapolis, Inc.*, the court allowed the EEOC to proceed on behalf of a local class even though it had not named each individual in the reasonable cause determination or conciliated individual class members because the employer had notice that the EEOC was investigating a local class. 279 F. Supp. 2d 974, 983 (S.D. Ind. 2003). It dismissed the nationwide class claims however because the employer had not had notice that the EEOC's investigation was national in scope. *Id.* Similarly, the court in *EEOC v. Dillard's Inc.* stated that the EEOC "is not required to identify every potential class member" before filing suit but permitted the EEOC to litigate only local class members' claims because the "scope of its pre-litigation efforts [was] limited" to one store location. No. 08-CV-1780, 2011 WL 2784516, at *6–8 (S.D. Cal. 2011).

The majority's new requirement that the EEOC separately investigate and conciliate each alleged ***victim*** of discrimination is inconsistent with the purpose of Title VII. Under this standard employers can avoid disclosure to the EEOC of complaining workers while the Commission is conducting its investigation and conciliation, then reveal the names

during court ordered discovery, and seek dismissal of the entire case on the ground of inadequate presuit efforts by the EEOC. This punishes the EEOC for employer recalcitrance and weakens its ability to enforce Title VII effectively. It also frustrates the underlying goal of the 1972 amendments intended to strengthen the EEOC's enforcement powers. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 325, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). The undesirable effects of a rule requiring the EEOC to investigate and conciliate each victim are illustrated in this case. The dismissal of scores of women claimants with apparent trial worthy claims is affirmed by the majority even though it was CRST which ended the conciliation process and even though the EEOC made substantial efforts to investigate and conciliate prior to filing its lawsuit.

While the majority justifies the dismissal by citing Title VII's emphasis on administrative resolution of disputes, here the EEOC made genuine efforts to resolve the dispute administratively and it was CRST that thwarted administrative resolution by providing the EEOC with incomplete information and rejecting its conciliation proposal. Given the EEOC's substantial presuit efforts, the district court's dismissal of trial worthy claims on the ground that the EEOC failed to complete its statutory duties should be reversed. At most, the case might have been stayed for further conciliation. *Cf. EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (finding summary judgment "far too harsh a sanction to impose on the EEOC even if the

court should ultimately find that conciliation efforts were prematurely aborted").

Finally, I respectfully disagree with the conclusion that the company's long haul trainers are not supervisors of the women trainees. In *Faragher v. City of Boca Raton*, the Supreme Court assumed that two employees were supervisors where they had been "granted virtually unchecked authority over their subordinates, directly controlling and supervising all aspects of [the alleged victim's] day-to-day activities." 524 U.S. 775, 808, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (internal quotations and punctuation omitted). It observed that the alleged victim had been "completely isolated" from her employer's higher management. *Id.* (citation omitted). Like the supervisors in *Faragher*, the CRST long haul trainers controlled almost all of a trainee's day to day activities, including when she was permitted to drive, when she could stop to use the bathroom, and when she could use the truck's satellite device to communicate with the outside world. The trainees were often confined in a truck for 28 consecutive days with their trainer who had authority to evaluate their progress and whose pass/fail rating was relied on by CRST in determining whether trainees would be promoted to full driver status. This unique environment facilitated the ability of certain trainers to make sexual propositions and demand sexual favors.

The tangible employment action cases cited by the majority involve situations where the harassers exercised less control over employment decisions than the trainers did in this case. *See Cheshewalla v. Rand*

& Son Const. Co., 415 F.3d 847, 851 (8th Cir. 2005) (harasser "may have consulted" with management on tangible employment action); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (termination decision based "in part" on alleged harasser's performance evaluation). Here, the lead drivers' pass/fail evaluations were relied on almost exclusively in deciding whether to promote a particular trainee. The fact that their promotion recommendations were nearly always followed weighs in favor of characterizing them as supervisors. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) (assuming harasser was supervisor although his hiring and promotion decisions were "subject to the approval of his supervisor, who signed the paperwork"). The record reveals that even CRST's human resources director characterized the trainers as "really no different than ... supervisors."

The district court's analysis overlooked the practical reality created by the relationship between the trainer and the trainee in living and working together in the confined space of a truck over long routes and by the unusual level of control the trainers exercised over every aspect of the trainees' existence while on the road. The isolated work environment, trainees' extended time alone with the trainer, the lack of oversight from company management, the trainers' near total control over trainees' daily lives, and the trainers' substantial control over trainees' promotion chances are sufficient to categorize the trainers as supervisors. The cases cited by the majority on this subject dealt with quite different factual circumstances

not relevant to the unique factors present here. I would reverse the district court's ruling that none of the trainers were supervisors and the resulting dismissal of certain trainees' claims and remand those claims for consideration of whether CRST made out an *Ellerth–Faragher* affirmative defense.

I concur in the other parts of the majority decision, including the remand of the claims of Starke and Jones and the reversal of the unprecedented $4.5 million attorney fee award against the EEOC in favor of CRST. On remand any fee award against the EEOC should be closely considered since one should be made only in "very narrow circumstances." *E.g. Marquart v. Lodge 837*, 26 F.3d 842, 848 (8th Cir. 1994); *see also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978); *EEOC v. Trans States Airlines, Inc.*, 462 F.3d 987, 996 (8th Cir. 2006) (affirming denial of attorney fee award against EEOC despite employer contention that it failed to conciliate).

In sum, the dismissal based on the conclusion that the EEOC failed to fulfill its presuit duties should be reversed, as should the conclusion that none of CRST's trainers were supervisors. While this is admittedly a complex case, the court should still give effect to Title VII and ensure that the EEOC can fulfill its congressional mandate.

Appendix D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and BARBARA GRANT, CINDY MOFFETT, LATESHA THOMAS and NICOLE ANN CINQUEMANO,
Plaintiffs-Interveners,

vs.

CRST VAN EXPEDITED, INC., Defendant.

No. 07-CV-95-LRR
August 13, 2009, Decided
August 13, 2009, Filed

JUDGES: LINDA R. READE, U.S. DISTRICT COURT CHIEF JUDGE.

OPINION BY: LINDA R. READE

OPINION

ORDER

I. INTRODUCTION

The matter before the court is the Order to Show Cause (docket no. 233).

II. RELEVANT PRIOR PROCEEDINGS

A. Administrative Proceedings

In September of 2005, Monika Starke contacted Plaintiff Equal Employment Opportunity Commission ("the EEOC"). Starke was working as a new truck driver for Defendant CRST Van Expedited, Inc. ("CRST"). She complained to the EEOC that two of her male trainers ("lead drivers") sexually harassed her.

The EEOC asked Starke to fill out a questionnaire. In response to the EEOC's questions, Starke alleged that lead drivers Bobb Smith and David Goodman sexually harassed her. Starke disclaimed any knowledge of whether other female truck drivers were sexually harassed while working for CRST.[1]

On October 18, 2005, the EEOC assigned Investigator LaVonne Williams to Starke's case. Investigator Williams reviewed Starke's questionnaire and, on October 27, 2005, interviewed Starke. Investigator Williams drafted a formal charge of sex discrimination on Starke's behalf and mailed it to her.

1. Charge

On December 1, 2005, Starke presented the Charge of Discrimination ("Charge") (EEOC No.

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[1] Starke's unfamiliarity with the plight of her female coworkers is not surprising, because CRST's truck drivers generally work in isolated two-person teams in locations across the United States.

260-2005-06856) to the EEOC.[2] Starke alleged that CRST "discriminated against [her] on the basis of [her] sex (female) in that [she] was subjected to sexual harassment, in violation of Title VII of the Civil Rights Act of 1964, [*42 U.S.C. § 2000e et seq.*,] as amended" ("Title VII"). EEOC Ex. 1 ("Pl.'s Ex.") (docket no. 244-2), at 104. Starke alleged the following "particulars" in her Charge:

> I was hired by [CRST] on June 22, 2005 in the position of Truck Driver. Since my employment began with [CRST,] I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob[b] Smith, Lead Trainer[,] began to make sexual remarks to me whenever he gave me instructions. He told me that the gear stick is not the penis of my husband, I don't have to touch the gear stick so often. "You got big tits for your size, etc . . ." I informed Bob[b] Smith that I was not interested in a sexual relationship with him. On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005 through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were traveling in order to get a passing grade.

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[2] The EEOC's records indicate Starke's allegations of sexual harassment were "[f]ormalize[d]" on December 1, 2005. EEOC Ex. 1 (docket no. 244-2), at 10.

Id. Further, Starke alleged that CRST "did not state why [she] was subjected to sexual harassment[,] which created a hostile work environment." *Id.*

Starke asked the EEOC to file her Charge and cross-file it with the Iowa Civil Rights Commission ("ICRC"). Pursuant to a work-sharing agreement, the EEOC formally received the Charge on behalf of both agencies and deemed the Charge to be "initially instituted" with the ICRC. (In the work-sharing agreement, the EEOC and ICRC reciprocally designated each other as agents for receiving charges of unlawful employment practices.) The EEOC sent a copy of the Charge to the ICRC, notified the ICRC that the Charge "is to be initially investigated by the EEOC," *id.* at 105, and began its formal investigation.[3]

2. Investigation

The EEOC ordered CRST to file a response to the Charge on or before December 30, 2005. Specifically, the EEOC asked for "a written position statement on

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[3] The ICRC waived its right to exclusive jurisdiction over charges initially instituted with it. For further explanation of the work-sharing agreement, *see Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 985-86 (N.D. Iowa 2003) (Bennett, C.J.). Because the EEOC deemed the Charge to be "initially instituted" with the ICRC, it was timely filed as to any alleged unlawful employment practice occurring on or after February 4, 2005, *i.e.*, any such practice occurring within 300 days of the filing of the Charge. 42 U.S.C. § 2000e-5(e)(1); *see, e.g., Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 360 n.8, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977) ("If a charge has been initially filed with or referred to a state . . agency, it must be filed with the EEOC within 300 days after the practice occurred . . .").

each of the allegations of the [C]harge, accompanied by documentary evidence and/or written statements, where appropriate. Also include any additional information and explanation you deem relevant to the charge." *Id.* at 409. To this end, the EEOC sent CRST a "Request for Information" ("RFI"), in which it asked CRST "to submit information and records relevant to the [Charge]." *Id.* at 408.

The EEOC advised CRST that its investigation was limited to an eleven-month time frame. The EEOC stated: "The following dates are considered to be the 'relevant period' for the attached [RFI]: January 2, 2005–November 2, 2005." *Id.* Further, the scope of the EEOC's investigation was focused on Starke and not other women. Apart from asking CRST general questions about the nature of its business and its policies and procedures against sexual harassment, the RFI dealt only with Starke's allegations in the Charge.[4]

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[4] In relevant part, the EEOC asked for the following categories of information:

> 2. State whether [Starke] complained to any supervisor or manager regarding the conduct described in the [Charge]. If your answer is yes, identify the person or persons with whom the complaint was registered and describe each and every action taken by [CRST] in response to that complaint. Provide a copy of any written document which reflects the complaint and the action taken as a result of the complaint.
>
> 3. State whether any other individual has complained to any supervisor or manager concerning the conduct described in the [Charge]. If the answer is yes, please list the following:

On December 21, 2005, CRST sent the EEOC its "position statement" and provided all of the information that the EEOC sought in the RFI.[5] CRST "vehemently

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> a. name, sex, position, of individual placing the complaint,
>
> b. name, sex, position, of supervisor or manager, and
>
> c. any actions taken by [CRST] in response to the complaint.
>
> Provide a copy of any written document which reflects the complaint and the action taken as a result of the complaint.
>
> 4. Identify every individual who, to your knowledge, has information relevant to the allegations. For each such individual, provide the following:
>
> a. name, sex, position,
>
> b. whether a present or former employee (if applicable), and
>
> c. address and telephone number
>
> 5. Identify the other employees who worked with [Starke] during the relevant period. Include:
>
> a. name, sex, position,
>
> b. last known address and telephone
>
> Submit copies of daily assignment sheets, time cards, attendance and records for the individuals listed in # 5, including [Starke].

Pl.'s Ex. 1 at 429.

[5] Indeed, CRST provided more information than the EEOC requested. In response to the third category of information, CRST identified two other female drivers, Lori Essig and Tamara Thiel, as having filed formal charges of discrimination with the EEOC against CRST during the relevant time frame.

denie[d]" that it had discriminated against Starke on the basis of sex. *Id.* at 359. CRST told the EEOC that it had investigated Starke's complaints against Smith and Goodman.

In investigating Starke's complaint against Smith, CRST interviewed Smith, Frank Taylor and Madeline Lovins. Smith "admitted to making inappropriate comments while training Ms. Starke, but nothing physical." *Id.* at 360. "He said that was the way in which he trained." *Id.* Taylor, an eyewitness to some of the alleged sexual harassment, told CRST that Smith had made inappropriate comments towards Starke. When Taylor told Starke that Starke should not drive with Smith if she were uncomfortable, Starke ignored Taylor's advice. Lovins, one of Smith's other trainees, raved about Mr. Smith's abilities. Based on this investigation, CRST gave Smith a "final verbal warning" for making inappropriate comments to Starke and barred Smith from training or driving with women.

In investigating Starke's complaint against Goodman, CRST learned that, on August 3, 2005, Starke reported to CRST in a routine evaluation that Goodman had treated her "very well." *Id.* at 360. Further, Starke did not report the alleged harassment in a timely manner; CRST did not learn of Starke's allegations against Goodman until September 27, 2005, in a letter from one of her attorneys. When CRST confronted Goodman with Starke's allegations, Goodman responded that he and Starke had a consensual sexual relationship. Goodman's current co-driver, Timothy Walker, attested to such a relationship between Goodman and Starke. Walker had

listened to four "love messages" Starke had left on Goodman's voicemail. *Id.* at 361. CRST's investigation ended prematurely on September 30, 2005, when CRST fired Goodman for an unrelated reason.

In the ensuing months, the EEOC sent a series of supplemental RFIs to CRST. On March 1, 2006, Bloomer requested the following information from CRST on or before March 15, 2006:

> 1. Provide the full name, last known home address, last known home and cell telephone numbers, and social security number for all female drivers that drove with [Smith] and/or [Goodman] during their employment with [CRST].
>
> 2. State whether there were any other complaints of harassment made against either [Smith] and/or [Goodman] by any other female employees. If yes, provide all documentation relevant to these complaints, including: the complaint, who made the complaint (with contact information), position title of person making the complaint, who received the complaint and date received, who investigated the complaint, records of the investigation, and outcome of the complaint.
>
> 3. Provide a copy of all disciplinary records involving [Starke], [Smith], and [Goodman], including discharge paperwork.
>
> 4. Provide the last known home address, home and cell telephone numbers, and social security number for [Taylor] and [Lovins].

Id. at 351. On March 10, 2006, CRST provided information to the EEOC in response to the first supplemental RFI.

On June 21, 2006, the EEOC sent a second supplemental RFI to CRST. The EEOC requested that, on or before July 4, 2006, CRST provide the EEOC with three categories of information:

> 1. A complete copy of all documents relating to each of [Starke]'s complaints, verbal and written; including, but not limited to, notes on calendars, telephone contact notes, and all other documents, etc.
>
> 2. Provide a complete copy of [CRST]'s investigative documents relating to each of [Starke]'s complaints. This is [sic] includes, but is not limited to: original interview notes, original phone contact notes, related internal e-mails, etc.
>
> 3. Provide a complete copy of the discharge documentation for [Smith] and [Goodman] and state the specific reason for the discharge of each; include the name and position title of the person(s) that recommended the discharge and the name and position title of the person(s) that made the final discharge decision.

Id. at 347. On June 30, 2006, CRST provided information to the EEOC in response to the second supplemental RFI.

3. The investigation broadens to a "class"

As the foregoing RFIs demonstrate, the EEOC did not take CRST's denial of wrongdoing at face value but

instead conducted a lengthy investigation of Starke's allegations.[6] Investigator Pamela Bloomer, whom the EEOC assigned to Starke's case on or about February 24, 2006, interviewed various persons, including Starke, witnesses to Starke's alleged sexual harassment and former co-workers of Goodman and Smith. Investigator Bloomer exchanged correspondence and conversed over the telephone with James Barnes, CRST's Director of Human Resources, and attorneys for both Starke and CRST.

During the course of her investigation, Investigator Bloomer learned that four other female CRST truck drivers, Lori Essig, Rhonda Morgan,[7] Remcey Peeples[8]

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[6] Notwithstanding the EEOC's broad powers, it appears that the EEOC never issued any administrative subpoenas but instead wholly relied upon voluntary compliance from CRST. *Cf.* 42 U.S.C. § 2000e-9 (EEOC's subpoena powers); § 2000e-8(a) (same); *EEOC v. W. Publ'g Co.*, 502 F.2d 599, 603 (8th Cir. 1974) (holding that the EEOC "is entitled to have access to, for the purposes of examination and copying, all evidence which is relevant and material to the . . . charge's allegations that discrimination [occurred]"); *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 855 (9th Cir. 2009) (holding that an EEOC subpoena that sought information as to a "class" of allegedly aggrieved individuals was not overbroad simply because the EEOC's investigation was ultimately founded upon a single charge of discrimination), *petition for cert. filed*, 77 U.S.L.W. 3680 (Jun. 1, 2009) (No. 08-1500) [*cert. denied*, 130 S. Ct. 574, 175 L. Ed. 2d 382 (2009)].

[7] On November 9, 2005, Morgan filed a Title VII lawsuit against CRST. See generally *Morgan v. CRST Van Expedited, Inc.*, No. 05-CV-181-JAJ, 2007 U.S. Dist. LEXIS 7566, 2007 WL 402407 (N.D. Iowa Feb. 1, 2007). The case settled in March of 2007 after the court denied CRST's motion for summary judgment.

and Tamara Thiel, had filed formal charges of discrimination against CRST for alleged sexual harassment. On July 28, 2006, the EEOC sent a third supplemental RFI to CRST. The EEOC requested that, on or before August 8, 2006, CRST provide the EEOC with "a copy of all other [c]harges of [d]iscrimination that [CRST] has received in the past five years from any government agency that alleges sexual harassment." *Id.* at 316. The EEOC also asked for "the name, gender, home address, and home telephone number of all employees that were trained by either [Smith] and/or [Goodman]," including "the dates of the training and documentation of any complaints made against these two trainers by any of these trainees." *Id.* CRST provided information to the EEOC in response to the third supplemental RFI on July 31, 2006.[9]

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[8] On January 30, 2006, Peeples filed a charge of discrimination against CRST. Peeples alleged that her trainer, Robert Stanley, sexually harassed her while she worked for CRST and CRST then retaliated against her when she reported the sexual harassment. The sexual harassment and retaliation ended on or before September 7, 2005. The EEOC eventually assigned Investigator Bloomer to look into Peeples' charge.

[9] CRST sent the EEOC copies or partial copies of charges of discrimination for Linda Austin (filed 2001), Patrice Cohen (filed 2004), Lori Essig (filed 2005), Jessica Goodrich (filed 2004), Sharon Hatcher (filed 2004), Bruce Hutchings (filed 2002), Karen McCall (filed 2004), Maryann Redding (filed 2002), Tamara Thiel (filed 2005), Gail Whisby (filed 2005) and Imogene Wilkie (filed 2002). CRST also represented to the EEOC that "Smith had one complaint after . . Starke . . . which led to his termination." *Id.* at 313.

In January of 2007, Investigator Bloomer expressed concern to Barnes about "the conduct of CRST's male lead drivers when they are training female drivers." *Id.* at 241.

> Specifically, [Investigator Bloomer] stated that it seems the "mentality" is that it is acceptable for male lead drivers to exert power and influence over female students, which may create a hostile work environment for the female drivers. [Investigator Bloomer] also expressed concern regarding the number of complaints lodged against CRST based on alleged "sexual favors" that male lead drivers requested of female student drivers.

Id.

On January 19, 2007, Barnes sent a letter to Investigator Bloomer, in which he recounted their phone conversation and sought "to address the concerns [Investigator Bloomer] raised . . . related to the two sexual harassment complaints of Monika Starke and Remcey Peeples." *Id.* Barnes stated that the number of complaints of sexual harassment was "quite minimal" and not "quite high" as the EEOC was postulating. *Id.* Barnes stressed that, since December of 2005, CRST had delivered 4,715 loads with a male lead driver and a female trainee yet CRST only "was made aware of and investigated eight situations in which a female student alleged a male lead driver engaged in sexual harassment." *Id.* at 241-42. Barnes claimed that CRST took "[p]rompt remedial action designed to end the harassment" so that only one student had filed a complaint with the EEOC. *Id.* at

242. By Barnes' calculations, "only 1.3% of all female students who had a male lead driver had any kind of issue involving alleged sexual harassment." *Id.* Barnes also pointed out to the EEOC that CRST had taken certain measures to prevent sexual harassment. He urged the EEOC to find "no probable cause" in the Starke and Peeples matters. *Id.*

On March 22, 2007, the EEOC propounded a fourth supplemental RFI to CRST. In relevant part, the EEOC requested the following categories of information on or before April 17, 2007:[10]

> 1. Most recent home and cell (if known) telephone number(s), home address, position title, social security number, and dates of employment for: Timothy Walker, Bryan Holliman, Chris Sullivan, Jeff Frances, all dispatchers that worked at any time on July 14, 2005 through July 15, 2005, and all female drivers, including student drivers regardless of hire date, who were employed at any time from January 1, 2005 to the present. If any of these individuals are no longer employed, please state the reason and provide supporting documentation.
>
> 2. Complete personnel files for: [Smith], [Goodman], [Starke], Robert Stanley, [Peeples], Roger Hooper, Glen Minor, Rick Long, and [Morgan].

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[10] The deadline was originally April 10, 2007. CRST asked for and received a one-week extension from the EEOC.

> 3. For each female driver that began her employment on or after January 1, 2005 (including drivers that are no longer employed) state the dates of her training and the name(s), telephone number(s), home address, and social security number of the driver(s) she drove with during her training period and the dates on which she drove with each driver.
>
> 4. For each female driver, regardless of hire date, who was employed at anytime from January 1, 2005 to the present (including student drivers) state the name(s), telephone number(s), home address, and social security number of all of her co-drivers from the period of January 1, 2005 to the present and the dates she drove with each driver.

Id. at 216.

> On April 11 and 12, 2007, Barnes notified Investigator Bloomer that CRST would provide the EEOC with the first and second categories of information before the deadline. Barnes balked, however, at providing the EEOC with the third and fourth categories of information before the EEOC's deadline. Barnes characterized it as an "administrative nightmare." *Id.* at 213. Barnes pointed out that CRST had approximately 3000 drivers at any given time and suffered from an annual turnover rate of 150%. Barnes promised to immediately send the EEOC the first and second categories of information and to continue to work on

> compiling the third and fourth categories of information.

Investigator Bloomer "stated it would be O.K. to combine [the third and fourth categories of information and] just give me the requested info[rmation] on female employees . . . without having to make [a] distinction of who was [the] trainer [and] who was [the] co-driver." *Id.* at 213. Investigator Bloomer also granted CRST an extension to April 30, 2007 to provide the EEOC with the requested information.

On April 13, 2007, Thomas Wolle, one of CRST's attorneys, contacted Investigator Bloomer. Attorney Wolle wrote:

> [Y]ou have requested information which, generally, requires CRST to cull thousands of files and records pertaining to all female drivers. These requests are overly broad and burdensome, and would probably require the company to spend literally hundreds of hours trying to compile the information. Moreover, I fail to see how these requests (i.e., the names of all female drivers from January 1, 2005 to present, along with phone number, address, social security number, and a listing of all of the co-drivers and trainers of such female drivers) are pertinent to the [Charge], either standing alone or in conjunction with the complaint lodged against CRST by [Peeples], which I understand you are also investigating.
>
> * * *

> [W]hile CRST is agreeable to providing information which will assist the EEOC in its investigation of specific charges of harassment, the requests which you've made are overly broad and not reasonably related to the charges being investigated.

Id. at 211.

On April 26, 2007, Investigator Bloomer left a message for Attorney Wolle and informed him that "the remainder of the info[rmation was] still due on [April 30, 2007]." *Id.* at 209. Investigator Bloomer threatened to "issue a subpoena if [she did not] receive this info[rmation] from him by [April 30, 2007]." *Id.*

CRST did not provide the EEOC with the remainder of the requested information before April 30, 2007, but the EEOC did not issue an administrative subpoena. On May 4, 2007, Attorney Wolle called Investigator Bloomer and left a message in which he indicated that CRST still "want[ed] a narrower inquiry." *Id.* at 207. On May 11, 2007, Attorney Wolle and Investigator Bloomer had a telephone conversation, in which Attorney Wolle characterized the EEOC's request as "overly broad." *Id.* at 207. He promised to meet with CRST's management about the EEOC's request and get back to Investigator Bloomer on or before May 16, 2007.

On May 18, 2007, Attorney Wolle informed investigator Bloomer that CRST had agreed to provide the remainder of the requested information on or before May 30, 2007. On May 29, 2007, CRST mailed the

remainder of the requested information to the EEOC on a computer disc.[11]

4. Letter of Determination

On July 12, 2007, the EEOC issued a Letter of Determination to CRST. The Letter of Determination was encaptioned "*Monika Starke, Charging Party v. CRST International, Inc., Respondent.*" In relevant part, John P. Rowe, District Director of the EEOC, wrote:

> I have considered all the evidence disclosed during the investigation and find that there is reasonable cause to believe that there is a violation of [Title VII], as amended, in that [CRST] subjected [Starke] to sexual harassment on the basis of her gender. In addition, I find that there is reasonable cause to believe that [CRST] has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII.
>
> * * *
>
> This determination is final. When the [EEOC] finds that violations have occurred, it attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, I invite the parties to join with the [EEOC] in reaching a just resolution of this matter. . . .

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[11] The parties did not provide the court with the disc. From the record presently before the court, it appears that the disc contained all of the information the EEOC requested.

> If [CRST] wishes to accept this invitation to participate in conciliation efforts, it may do so at this time by proposing terms for a conciliation agreement. That agreement should be provided to the [EEOC] representative within (14) days of the date of this determination. . . .
>
> Should [CRST] have further questions regarding the conciliation process or the conciliation terms it would like to propose, we encourage it to contact the assigned [EEOC] representative. Should there be no response from [CRST] within (14) days, we may conclude that further conciliation efforts in this matter would be futile or non-productive.

Id. at 22-23.

5. Conciliation

On August 6, 2007, Attorney Wolle informed Investigator Bloomer that CRST wished to participate in conciliation. On August 7, 2007, Attorney Wolle apologized to Investigator Bloomer for taking so long to respond to the EEOC's offer to conciliate. He then stated: "My client is interested in conciliation. Please contact me to schedule the same. Thank you." *Id.* at 16.

On August 8, 2007, Investigator Bloomer explained the EEOC's view of the conciliation process to Attorney Wolle in a voicemail message. Investigator Bloomer also asked Attorney Wolle to "[p]lease send . . . [CRST's] proposal by August 16, 2007[,] so that we can set up the meeting you requested." *Id.* at 17. Attorney Wolle responded and "indicat[ed] he wanted [the] EEOC to suggest a proposal for conciliation

instead of the other way around." Stipulation (docket no. 247-2), at 5.

On August 17, 2007, Attorney Wolle and Investigator Bloomer spoke on the telephone. Investigator Bloomer recounts their conversation as follows:

> We discussed several issues including [the] EEOC's request that a monitor be appointed to examine the employer's workplace to discover and eliminate sexual harassment, and relief for the class. He told me he wanted more information regarding the class. I was not able to provide names of all class members at that time, or an indication of the size of the class, but I believe I told him that [the] EEOC would require as part of conciliation that CRST send a letter to past and present employees to help identify class members so settlements could be paid to them.
>
> * * *
>
> Mr. Wolle told me on August 17, 2007 that he would think over [the] EEOC's proposal and would try to call me back.

Id.

On August 24, 2007, Attorney Wolle spoke to Investigator Bloomer on the telephone and "told [her] that he had spoken to [Starke's] counsel, that it did not appear conciliation would be successful, and that he would send a confirming email." *Id.* Investigator Bloomer told Attorney Wolle that "the next step after

conciliation would be [the] EEOC's internal decision whether to litigate on behalf of [Starke] and the class or provide [Starke] with a [right-to-sue] letter. *Id.*[12]

On August 27, 2007, Attorney Wolle emailed Investigator Bloomer. The subject of the email was "Monika Starke/CRST Van Expedited, Inc." *Id.* at 13. Attorney Wolle wrote the email "to confirm our phone conference . . . , in which I indicated that, in light of the monetary demand made by Ms. Starke's attorney . . . , CRST does not wish to engage in conciliation efforts because we are confident that conciliation will not result in a resolution of this matter." *Id.*

On August 28, 2007, the EEOC informed CRST that the EEOC had "determined that its efforts to conciliate [the Charge] as required by [Title VII] have been unsuccessful." *Id.* at 9. The EEOC stated that "further conciliation efforts would be futile or non-productive," indicated it would "not make further efforts to conciliate [the Charge]," and was "forwarding the case to our legal unit for possible litigation." *Id.*

B. Legal Proceedings

1. Complaint

On September 27, 2007, the EEOC filed the instant lawsuit on behalf of Starke "and a class of similarly situated female employees of [CRST] . . . ." Complaint (docket no. 2), at 1. Pursuant to Section 706 of Title VII, *42 U.S.C. § 2000e-5*, the EEOC brought suit in its own

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[12] On June 28, 2006, one of Starke's attorneys asked the EEOC for a right-to-sue letter. Pl.'s Ex. 1 at 119.

name "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Starke] and a class of similarly situated female employees of [CRST] who were adversely affected by such practices." First Amended Complaint ("EEOC's Complaint") (docket no. 8), at 1.[13] The EEOC generally alleges that Starke and the other similarly situated women "were adversely affected . . . when their lead drivers or team drivers subjected them to sexual harassment and to a sexually hostile working environment based on their gender, and CRST failed to prevent, correct, and protect them . . . ." *Id.* [14]

The heart of the EEOC's Complaint contains the following specific allegations against CRST:

> 7. Since at least July 2005, CRST engaged in unlawful employment practices in violation of *Sections 703(a)* and *704(a)* of Title VII, *42 U.S.C. §§ 2000e-2* and *2000e-3*. Among other

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[13] The EEOC's Complaint, filed on November 16, 2007, corrected a typographical error in the Complaint. Ruling (docket no. 31), at 1 n.1.

[14] Notably, the EEOC did *not* allege that CRST was engaged in "a pattern or practice" of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII, *42 U.S.C. § 2000e-6*. Earlier in these proceedings, the court assumed the EEOC had the right to maintain a pattern-or-practice claim in this case but dismissed it with prejudice. The court held as a matter of law that there was insufficient evidence from which a reasonable jury could find that it was CRST's "standard operating procedure" to tolerate sexual harassment. Order (docket no. 197), at 57 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)).

things, two of its lead drivers subjected Starke to sexual harassment during their supervision of [her] (including, but not limited to, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments), which further created a sexually hostile and offensive work environment. CRST is liable for the harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect Starke from the harassment and the hostile work environment, culminating in her discharge from employment with CRST.

8. Other similarly situated female employees of CRST were also subjected to sexual harassment and a sexually hostile and offensive work environment while working for CRST, including, among other things, unwelcome sexual conduct, other unwelcome physical touching, propositions for sex, and sexual comments from their lead drivers or team drivers. CRST is liable for harm caused by the harassment and the hostile and offensive work environment because of the actions of its lead drivers or team drivers and because of its failure and refusal to take prompt and appropriate action to prevent, correct, and protect its female employees from the harassment and the hostile environment.

> 9. The effect of the practices complained of in Paragraphs 7 and 8 above has been to deprive Starke and class of similarly situated female employees of equal employment opportunities, and to otherwise adversely affect their status as employees, because of sex.

EEOC's Complaint at 2-3. The EEOC alleges that CRST's actions "were intentional" and "done with malice or with reckless indifference to the federally protected rights of Starke and the class of similarly situated female employees." *Id.* at 3.

The EEOC asks the court for "a permanent injunction enjoining CRST and its officers, successors, and assigns, and all persons in active concert or participation with them, from engaging in sexual harassment [and] any other employment practice which discriminates on the basis of sex." *Id.* at 4. The EEOC further asks the court to "[o]rder CRST to institute and carry out policies, practices, and programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices." *Id.* Finally, the EEOC asks the court to order CRST to pay Starke and the similarly situated female employees compensatory damages, punitive damages and ordinary costs. *Id.*

2. "The Great Unknown"

The Letter of Determination did not provide CRST with any notice as to the size of the "class of employees and prospective employees [subjected] to sexual harassment." Pl.'s Ex. at 22. Similarly, the EEOC's Complaint provides no indication of how many

"similarly situated female employees" the EEOC alleged to exist.[15] EEOC's Complaint at 3. In other words, it was unclear whether the instant Section 706 lawsuit involved two, twenty or two thousand "allegedly aggrieved persons." 42 U.S.C. § 2000e-5(f)(1).

In the initial stages of this case, it appeared the number of allegedly aggrieved persons was relatively small. On February 8, 2008, the court adopted the parties' Scheduling Order and Discovery Plan ("Scheduling Order") (docket no. 21). Among other things, the parties agreed to a December 7, 2008

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[15] The vague reference in the EEOC's Complaint to "Starke and a class of similarly situated female employees" added unnecessary confusion to this case in at least two other respects:

> First, the phrase "Starke and a class of similarly situated female employees" does not comport with the language or structure of Section 706, the statute under which the EEOC sued. *See* 42 U.S.C. § 2000e-5(f)(1) (referring to "[t]he person or persons aggrieved" and "the person aggrieved"). Such phrase naturally evokes the thought of Starke as the named plaintiff in a Rule 23 class action against CRST; to the contrary, it is settled that a Section 706 federal enforcement action bears little resemblance in practice to a Rule 23 class action. *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 333-34, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980); *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002) (Posner, J.).
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> Second, the phrase "Starke and a class of similarly situated female employees" does not mirror the Letter of Determination. In the Letter of Determination, the EEOC found reasonable cause to believe that CRST "subjected [Starke] to sexual harassment on the basis of her gender" and "has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII."

deadline for completion of discovery and a trial ready date of May 15, 2009. The parties estimated that trial would last "20 days." Scheduling Order at 2 (emphasis in original). In reliance upon the parties' representations, the court scheduled trial to commence at some time "during the two-week period beginning on June 15, 2009" with the exact dates and times of the trial to be determined closer in time to the trial date. Trial Management Order (docket no. 22), at 1 (emphasis omitted).

As discovery progressed, however, it became clear that the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief. Instead, the EEOC was using discovery to find them. On May 29, 2008, for example, the EEOC sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit. On September 28, 2008, the EEOC sent another 730 solicitation letters to former CRST female employees. There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

On August 8, 2008, CRST asked the court to establish a date "by which [the] EEOC completes its identification of class members." Response (docket no. 38), at 4. The EEOC responded that it had identified "a total of 49 class members so far," predicted the "total class will reach between 100 and 150 individuals,"

indicated it believed it could identify "the bulk of the class members" by October 15, 2008, and suggested a December 7, 2008 deadline for identifying the "class members." Reply (docket no. 42), at 1-3.

On August 20, 2008, the court set a October 15, 2008 deadline for the EEOC "to disclose the identity of class members." Order Modifying Discovery Plan (docket no. 44), at 2. The court also continued the parties' previously agreed-upon discovery deadline to January 15, 2009.

By October 15, 2008, the EEOC identified approximately 270 allegedly aggrieved persons to CRST. The number of "class members" greatly increased in the ten days immediately preceding the deadline. Prior to October 7, 2008, the EEOC had identified only seventy-nine "class members" to CRST. On October 7, 2008, the EEOC identified 40 new "class members" and advised CRST that the "[i]nvestigation is continuing." Seventh Supplement to Initial Disclosures (docket no. 243-5), at 1. On October 15, 2008, the EEOC identified 119 more "class members" and again advised CRST that the "[i]nvestigation is continuing." Eighth Supplement to Initial Disclosures (docket no. 243-6), at 1; Ninth Supplement to Initial Disclosures (docket no. 243-7), at 1; Tenth Supplement to Initial Disclosures (docket no. 243-8), at 1. Also on October 15, 2008, the EEOC partially identified 66 additional persons[16] and stated the "EEOC expects

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[16] The EEOC apparently did not know the addresses of any of these 66 women; indeed, the EEOC did not even know how to spell many of their names. The EEOC stated that it "understands that

[that] all [of] these individuals are class members. . . ." Eleventh Supplement to Initial Disclosures (docket no. 243-9), at 1. Again, the EEOC stated that the "[i]nvestigation is continuing." *Id.* at 1.

The total number of allegedly aggrieved persons identified or partially identified by the EEOC by October 15, 2008 was much greater than CRST had anticipated based upon the EEOC's prior representations to the court. *See, e.g.*, Response (docket no. 42), at 1-2 (EEOC estimating "the total class will reach between 100 and 150 individuals"); Scheduling Order at 2 (EEOC estimating a twenty-day trial). Therefore, on November 6, 2008, CRST filed a "Motion under *Rule 16(f)* for an Order to Show Cause Concerning the EEOC's Identification of Class Members" ("Motion to Show Cause") (docket no. 56). CRST alleged that the EEOC did not have a good-faith basis for naming so many allegedly aggrieved persons; CRST accused the EEOC of adopting a policy of "naming everyone and asking questions later" just before the October 15, 2008 deadline. Brief in Support of Motion to Show Cause (docket no. 56-2), at 10. CRST alleged that the EEOC had simply added a large number of names found in CRST's human resources files without ever speaking to those individuals. Further, the EEOC had indicated to CRST that it

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CRST has information relating to the addresses of these individuals" and "expressly reserves the right to amend this disclosure as investigation and discovery, including discovery into these individuals' potential claims, is conducted." Eleventh Supplement to Initial Disclosures (docket no. 243-9), at 1.

reserved unto itself the option in the future "to remove some women from this list at a later date." *Id.* at 11.

In ruling upon the Motion to Show Cause, the court held that the EEOC had complied with the letter, if not the spirit, of the court's order. The court took the EEOC at its word that it had a good-faith belief that each and every one of the approximately 270 women it had disclosed to CRST before the deadline had an actionable claim for sex discrimination. Recognizing that the EEOC is "the master of its own case" (in the sense that it has the statutory authority to proceed on behalf of allegedly aggrieved persons without their consent), *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002), the court declined to "strike" all women who had not given the EEOC informed consent to proceed on their behalf in this case. The court expressed concern, however, that "CRST [still] might unfairly face a 'moving target' of prospective plaintiffs as discovery winds down and trial approaches." Order (docket no. 66), at 8.

The court invoked its inherent case management authority, Fed. R. Civ. P. 26(f), Fed. R. Civ. P. 16(b) and LR 16, and adopted the following three rules to forestall any prejudice to CRST. The court ordered the EEOC to (1) immediately file with the court a corrected list of the approximately 270 allegedly aggrieved persons it had disclosed to CRST on October 15, 2008 (the list the EEOC previously disclosed contained many errors); (2) immediately inform CRST and file an amended disclosure list with the court as soon as it learned that it no longer wished to pursue individual claims on behalf of any of the women on the list; and (3)

make all allegedly aggrieved persons on whose behalf the EEOC sought relief available to CRST for a deposition before the conclusion of discovery on January 15, 2009. The court then ordered: "If the EEOC fails to make a woman available, as a discovery sanction the court will not permit her to testify at trial and will bar the EEOC from seeking relief on her behalf in this case." *Id.* at 9.

Subsequently, the EEOC made approximately 150 of the 270 allegedly aggrieved women available for deposition. Because the EEOC did not make the remainder of the women available to CRST for deposition prior to January 15, 2009, the court held that the EEOC could not seek relief for them.

In ruling upon a series of dispositive motions, the court examined the merits of most of the approximately 150 allegedly aggrieved persons' allegations. The court held that CRST could not be held liable for the allegations of the majority of these women, including Starke and Peeples, and barred the EEOC from seeking relief on their behalf at trial. At present, the EEOC intends to seek relief at trial on behalf of 67 allegedly aggrieved persons: Kierston Alleva, Tracy Ball, Stacy Barager, Pamela Barlow, Belinda Bedford, Mary Bender, Lillie Bingaman, Peggy Blake, Amber Blauvelt, Adda Brown-Lenzer, Deborah Carey, Kelli Carney, Diana Chester, Margaret Daniels, Darleaner Deese, Donna Dickson, Barbara Dixon, Nicole Edwards, Cynthia Fisk, Robryna Fitch, Yvonne Fortner, Marie Foster, Barbara Grant, Zelestine Grant, Martha Griffin, Sherri Halley, Wanda Hasbell, Catherine Heckman, Victoria High, Carolyn

Hunsucker, Lola Hutton, Sheila Jackson, Tequila Jackson, Diona Johnson, Angela Lesmeister, Tessa Medley, Patricia Merritt, Cindy Moffett, Valerie Montoya, Debra Moorer, Veronica Mora, Julie Noernberg, Bobbi O'Dell, Anya Owens, Kathleen Peterson, Carole Petitt, Margaret Rice, Shalitha Ross, Denise Roundtree, Mechelle Schuder, Jammie Scott, Cathy Shaw, Annette Smith, Gloria South, Latesha Thomas, Doris Tiberio, Joyce Toppin, Tracye Taylor, Tracy Tuttle, Ramona Villarreal, Rebecca Waisr, Barbara Wallace, Tiani Warden Thompson, Kimberly Watson, Rhonda Wellman, Tameisha Wilson and Pamela Wright-Hoffman.[17] The EEOC contends that these 67 women fall within the "class" in the Letter of Determination and the "class" in the EEOC's Complaint.

3. Order to Show Cause

On May 11, 2009, the EEOC filed a "Motion for Order to Show Cause Why Plaintiff EEOC's Section 706 Claims on Behalf of Allegedly Aggrieved Persons Should Not Be Dismissed for Failure to Exhaust Remedies" ("Motion") (docket no. 222-1). On May 15,

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[17] The court notes that, on April 3, 2007, the EEOC issued Foster a right-to-sue letter and stated that "the [EEOC] is unable to conclude that the information obtained establishes violations of the statutes." Def.'s Ex. 4 to Motion (docket no. 222-6), at 3. On December 27, 2007, the EEOC issued an identical letter to Bedford. *Id.* at 2.

2009, the EEOC filed a Resistance (docket no. 229-1) to the Motion.[18]

On May 18, 2009, the court granted the Motion and issued the Order to Show Cause. The court had "doubts about the EEOC's ability to pursue this matter in whole or in part at trial" in light of the Eighth Circuit Court of Appeals' statements in *EEOC v. Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992). In *Delight Wholesale*, the Eighth Circuit Court of Appeals stated:

> The permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge. The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge *or developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding.*

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[18] On the same date, Plaintiffs-Interveners Barbara Grant, Cindy Moffett, Latesha Thomas and Nicole Ann Cinquemano and former Plaintiffs-Interveners Janet Boot and Remcey Jeunenne Peeples filed a Response (docket no. 230) to the Motion. The court agrees that the Motion "clearly does not address whether [these seven women] have met the preconditions to pursue their suits," Response at 4, and so the court does not discuss their claims here.

973 F.2d at 668-69 (emphasis added and citations omitted). The Eighth Circuit Court of Appeals held that certain claims not included in the original charge of discrimination were "properly before the district court" but stressed that the EEOC discovered the unincluded claims during a reasonable investigation of the charge, the unincluded claims were "clearly like or related to the substance of the EEOC charge," the "EEOC included the [unincluded claims] in its reasonable cause determination" and the "EEOC gave [the employer] an opportunity to conciliate [the unincluded claims]." *Id.* at 669.

On May 29, 2009, the parties filed their Exhibits (docket nos. 243, 244, 245 & 246), a Stipulation (docket no. 247-2) and an Allegedly Aggrieved Persons Chart (docket no. 247-1). On June 1, 2009, the court held a show cause hearing. Attorneys Brian C. Tyndall, Jean P. Kamp, Jeanne Bowman Szromba, Ann M. Henry and Nicholas J. Pladson represented the EEOC. Attorneys John H. Mathias, Jr., Robert T. Markowski, Sally K. Sears Coder and Kevin J. Visser represented CRST. On July 17, 2009, the parties filed an Amended Allegedly Aggrieved Persons Chart (docket no. 261).

The matter is fully submitted and ready for decision.

III. STATUTORY FRAMEWORK

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). "The Supreme Court has

determined . . . that sexual harassment 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' qualifies as [unlawful] sex discrimination under Title VII." *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 928 (8th Cir. 2008) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)).

Section 706 of Title VII, 42 U.S.C. § 2000e-5, authorizes the EEOC to bring suit in its own name to ferret out unlawful sexual harassment. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 324, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) (succinctly explaining, in the seminal § 706 case, that the EEOC "need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals"). Specifically, § 706 permits the EEOC to sue a private employer on behalf of a "person or persons aggrieved" by the employer's unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1).

The EEOC may file a § 706 lawsuit against a private employer, after the filing of a charge of unlawful employment discrimination with the EEOC, if the EEOC finds "reasonable cause" to believe the employer has violated Title VII and makes a good-faith attempt to settle the matter through conciliation. *Id.* In *Occidental Life Insurance Company of California v. EEOC*, the Supreme Court neatly explained:

> Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a

> federal court. That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice. A charge must be filed within 180 [or 300] days after the occurrence of the allegedly unlawful practice, and the EEOC is directed to serve notice of the charge on the employer within 10 days of filing. The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true. This determination is to be made "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." If the EEOC finds that there is reasonable cause it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." When "the Commission is unable to secure . . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge."

432 U.S. 355, 359-60, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977) (footnotes, citations and alteration omitted).

The EEOC is "master of its own case" when bringing suits on behalf of allegedly aggrieved persons in a § 706 lawsuit. *Waffle House*, 534 U.S. at 291. For example, it may bring suit with or without the consent of the allegedly aggrieved persons. *Id.* at 291-92. Nonetheless, it is axiomatic that the EEOC stands in

the shoes of those allegedly aggrieved persons in the sense that it must prove all of the elements of their sexual harassment claims to obtain individual relief for them. Likewise, the full range of legal remedies available to individuals is generally available to the EEOC if the EEOC prevails on their behalf. The EEOC is entitled to equitable relief, 42 U.S.C. § 2000e-5(g), and it may also usually pursue compensatory and punitive damages, 42 U.S.C. § 1981a(a)(1).

Although a § 706 lawsuit must begin with a formal charge of discrimination, *Occidental Life*, 432 U.S. at 359, a § 706 lawsuit "is not confined to the specific allegations in the charge," *Delight Wholesale*, 973 F.2d at 668. While Section 706 does not expressly contemplate that the EEOC might bring suit as to matters not contained in a charge of discrimination, it is a judicially created doctrine that "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *Gen. Tel.*, 446 U.S. at 331 (citing *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364 (4th Cir. 1976) and *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975)).[19] In other words, the EEOC's lawsuit

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[19] The plain language of *§ 706* contemplates that the "charge shall be filed by *or on behalf of the person aggrieved* within three hundred days after the alleged unlawful employment practice occurred[.]" 42 U.S.C. § 2000e-5(e)(1) (emphasis added). *Section 2000e-5* makes no exception for the EEOC, even though it clearly contemplates EEOC enforcement actions. To promote judicial and administrative economy, courts granted the EEOC the ability to use an individual charge of discrimination as "a jurisdictional springboard" without requiring the formality of multiple charges

may include "discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge." *Delight Wholesale*, 973 F.2d at 668.

The leeway afforded to the EEOC by this judicially created "reasonable investigation rule" is broad but not absolute. "The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination . . . developed during a reasonable investigation of the charge, *so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding. Id.* at 668-69 (emphasis added); *see also EEOC v. Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1976) ("[T]he original charge is sufficient to support EEOC administrative action, as well as an EEOC civil suit, for any discrimination stated in the charge itself or discovered in the course of a reasonable investigation of that charge, *provided such additional discrimination was included in the EEOC 'reasonable cause' determination and was followed by compliance with the conciliation procedures of [Title VII].*" (Emphasis added.)). As long as the EEOC investigates, issues a reasonable cause determination for and conciliates the additional allegations of discrimination, the reasonable investigation rule is quite expansive. A noted treatise summarizes the state of the "reasonable investigation rule" as follows:

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of discrimination. *See, e.g., Gen. Elec.*, 532 F.2d at 364 (cited with approval in *Gen. Tel.*, 446 U.S. at 331).

> Thus, *subject to the investigation and conciliation requirements* . . . ., it has been held that the EEOC can bring an action alleging sex discrimination when the initial charge only alleged race discrimination, an action alleging classwide discrimination where the original charge only alleged discrimination against an individual, an action for discrimination occurring at other branches of the employer's operation than that where the charging party was employed, and an action to redress race discrimination in promotions, transfers, and terms and conditions of employment when the original charge alleged only discrimination in hiring and discharges.

4 Lex K. Larson, *Employment Discrimination* § 75.01[2][a], at 75-10 (2d ed. July 2008). (footnotes omitted, emphasis added).

As the italicized portions of the preceding paragraph make clear, the EEOC may not use the reasonable investigation rule to circumvent Title VII's "integrated, multistep enforcement procedure" of investigation, determination and conciliation as to the additional allegations of discrimination. *Occidental Life*, 432 U.S. at 355. "[T]here must be investigation and conciliation of a claim before it is litigated." *EEOC v. KECO Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984). While the reasonable investigation rule allows the EEOC to expand its *administrative proceedings* beyond the mere allegations in a charge, the EEOC may only bring a § 706 lawsuit to remedy allegations of discrimination it investigates, finds reasonable cause to

believe are true and attempts in good-faith to conciliate. *See, e.g.*, *EEOC v. Am. Home Prods.*, 165 F. Supp. 2d 886, 909 (N.D. Iowa 2001) (Bennett, C.J.) ("[E]ven where additional claims are like or reasonably related to the claims asserted in the original charge, and could be reasonably expected to grow out of the investigation of the original charge, the Eighth Circuit Court of Appeals requires a determination of reasonable cause *as to those claims* and the opportunity for conciliation before the EEOC may include those claims in its suit." (Emphasis in original.)); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1262 (D. Colo. 2007) ("[T]he finding that the EEOC is not closely bound to the specifics of the original charge does not mean that the EEOC may bring a civil action regarding any discrimination it uncovers in the course of an investigation. Instead[,] . . . the EEOC must give adequate notice to a defendant-employer of the nature of the charges against it, as well as an opportunity to resolve all charges through conciliation."); *see also EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (Posner, J.) ("The charge incites the investigation, *but if the investigation turns up additional violations the [EEOC] can add them to its suit.*" (Emphasis added.)); *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996) ("[The] EEOC may allege in a complaint whatever unlawful conduct it has uncovered *during the course of its investigation*, provided that there is a reasonable nexus between the initial charge and the subsequent allegations in the complaint." (Emphasis added.)); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982) ("The [EEOC's] functions of

investigation, decision of reasonable cause and conciliation are crucial to the philosophy of Title VII. It is difficult to believe Congress directed the [EEOC] . . . [to] institute such litigation before it makes a determination." (quoting *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974))), *aff'd*, 516 F.2d 1297 (3d Cir. 1975)); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003) ("[T]he eventual lawsuit must arise from the 'scope of the investigation.' Each step along the administrative path--from charge to investigation and from investigation to lawsuit--must grow out of the one before it.").

With respect to Title VII's conciliation requirement, "[n]othing less than a 'reasonable' effort to resolve with the employer the issues raised by the complainant will do." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003). "This effort must, at a minimum, make clear to the employer the basis for the EEOC's charges against it." *Id.* "Otherwise, it cannot be said that the [EEOC] has provided a meaningful conciliation opportunity." *Id.* "[C]onciliation is at the heart of Title VII." *Id.* A lawsuit is "a last resort." *Id.*

IV. ANALYSIS

It is not disputed that the EEOC was entitled to expand its investigation of Starke's Charge and consider whether CRST had tolerated the sexual harassment of other female drivers. The EEOC "ascertain[ed]" the allegations of a number of other female drivers, including Essig, Morgan, Peeples and Thiel, "in the course of a reasonable investigation of" Starke's Charge. *Gen. Tel.*, 446 U.S. at 331. These other

female drivers alleged sex "discrimination like or related to the substance of the allegations" in Starke's Charge and their allegations could "be expected to grow out of the investigation triggered by" Starke's Charge. *Delight Wholesale*, 973 F.2d at 668.

Furthermore, the court may not second-guess the EEOC's findings in the Letter of Determination that "there [was] reasonable cause to believe that there [was] a violation of [Title VII], as amended, in that [CRST] subjected [Starke] to sexual harassment on the basis of her gender" and "reasonable cause to believe that [CRST] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII." Pl.'s Ex. at 22. The court does not have jurisdiction to review the EEOC's "Case Log" for Starke's Charge for the purpose of making de novo reasonable cause findings. *See, e.g., Caterpillar*, 409 F.3d at 833 ("[Courts] have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the [EEOC's] investigation. The existence of probable cause to sue is generally and in this instance not judicially reviewable.").

> "That line of inquiry would deflect the efforts of both the court and the parties from the main purpose of this litigation: to determine whether [a defendant] has actually violated Title VII. Acceptance of [such a] theory would entitle every Title VII defendant to litigate as a preliminary matter whether EEOC had a reasonable basis for its determination . . . . [This determination] would effectively make every Title VII suit a two-step action: First, the

> parties would litigate the question of whether EEOC had a reasonable basis for its initial finding, and only then would the parties proceed to litigate the merits of the action."
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> [N]othing in the legislative history of Title VII indicates that Congress intended such challenges. [I]t is one thing to require the EEOC to adhere to its statutorily mandated procedures, but quite another to unduly burden that agency with additional lengthy litigation. [T]he EEOC's reasonable cause determination does not adjudicate rights and liabilities; it merely places the defendant on notice of the charges against him. If the charge is not meritorious, procedures are available to secure relief, i.e.[,] a de novo trial in the district court.

KECO, 748 F.2d at 1100 (quoting *EEOC v. Chi. Miniature Lamp Works*, 526 F. Supp. 974 (N.D. Ill. 1981)).

That said, the case at bar is one of those exceptionally rare § 706 cases in which the record shows that the EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint–let alone issue a reasonable cause determination as to those allegations or conciliate them. The record shows that the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case. As to the 67 allegedly aggrieved persons for whom the EEOC presently intends to seek relief at trial, the following facts are undisputed:

- The EEOC did not investigate the specific allegations of any of the 67 allegedly aggrieved persons until after the Complaint was filed. For example, the EEOC did not interview any witnesses or subpoena any documents to determine whether any of their allegations were true.

- The EEOC did not identify any of the 67 allegedly aggrieved persons as members of the Letter of Determination's "class" until after it filed the Complaint. Indeed, prior to filing the Complaint, CRST enquired as to the size of the "class" and the EEOC responded that it did not know.

- The EEOC did not make a reasonable cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the Complaint. Indeed, at the time the EEOC issued the Letter of Determination on July 12, 2007, 27 of the remaining 67 allegedly aggrieved persons *had not yet been sexually harassed.* Indeed, most of these 27 women allege they were sexually harassed *after the instant lawsuit was filed.* Although 38 of the remaining 40 allegedly aggrieved persons allege they were sexually harassed before the EEOC issued the Letter of Determination on July 12, 2007, the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint.[20] The EEOC used discovery in the instant lawsuit to find them.

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[20] The two exceptions are Shaw and Thomas. Shaw alleges that she was sexually harassed in February and March of 2006. Thomas alleges that she was sexually harassed in November and December of 2006.

- The EEOC did not attempt to conciliate the specific allegations of the 67 allegedly aggrieved persons prior to filing the Complaint.

The EEOC cites no binding legal authority that allows it to do what it is attempting to do in this case, *i.e.*, bootstrap the investigation, determination and conciliation of the allegations of Starke and a handful of other allegedly aggrieved persons into a § 706 lawsuit with hundreds of allegedly aggrieved persons. The mere fact that Starke and a handful of other women allege they were sexually harassed while working for CRST provides no basis for the EEOC to litigate the allegations of 67 other women in this lawsuit.[21] To the contrary, when presented with analogous facts, the courts have largely resisted the EEOC's attempts to perfect an end-run around Title VII's statutory prerequisites to suit. *See, e.g.*, *EEOC v. Target Corp.*, No. 02-C-146, 2007 U.S. Dist. LEXIS 35762, 2007 WL 1461298 (E.D. Wis. May 16, 2007); *EEOC v. Outback Steakhouse of Fla., Inc.*, 520 F. Supp. 2d 1250, 1263-68 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 982-83 (S.D. Ind. 2003); *EEOC v. E. Hills Ford Sales, Inc.*, 445 F. Supp. 985, 987-89 (W.D. Pa. 1978).

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[21] The court expresses no view as to whether the EEOC's investigation, determination and conciliation of Starke's Charge would be sufficient to support a pattern-or-practice lawsuit. *Cf. EEOC v. Dial Corp.*, 156 F. Supp. 2d at 934-44 (N.D. Ill. 2001) (permitting the EEOC to use discovery to find more victims of sexual harassment in a pattern-or-practice case).

Target is instructive. In *Target*, as here, the EEOC sought to seek relief in a § 706 action on behalf of an allegedly aggrieved person, James Daniels, who never filed a charge of discrimination against the defendant and whose allegations the EEOC did not investigate before filing its complaint in federal district court. 2007 U.S. Dist. LEXIS 35762, 2007 WL 1461298 at *2. It was undisputed that the EEOC did not learn of Daniels' allegations of discrimination against Target until after the lawsuit was filed. *Id.* Chief Judge Rudolph T. Randa of the United States District Court for the Eastern District of Wisconsin barred the EEOC from seeking relief on Daniels' behalf. Chief Judge Randa reasoned:

> The EEOC only learned of Daniels' . . . allegations during the course of discovery in this lawsuit. There is a clear distinction between "facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit." *Jillian's*, 279 F. Supp. 2d at 981. An EEOC complaint must be "the product of the *investigation* that reasonably grew out of the underlying charges." *Jillian's*, 279 F. Supp. 2d at 980 (emphasis added). The EEOC may not use discovery in the resulting lawsuit "as a fishing expedition" to uncover more violations. [W]alner, 91 F.3d at 971.
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> It is true that a "suit by the EEOC is not confined 'to claims typified by those of the charging party . . . and [the defendant] is mistaken to think that the EEOC's complaint

> must be closely related to the charge that kicked off the [EEOC]'s investigation." *[Caterpillar]*, 409 F.3d [at] 833[.] However, *Caterpillar* also states that: "'Any violations that the EEOC ascertains *in the course of a reasonable investigation* of the charging party's complaint are actionable.'" *Caterpillar*, 409 F.3d at 833 (quoting [*Gen. Tel.] Co. v. EEOC*, 446 U.S. [at 331])) (emphasis added). Applying that standard, it is clear that the alleged violations with respect to Daniels were not discovered by the EEOC in the course of its investigation into [a charging party's] complaint.

Target, 2007 U.S. Dist. LEXIS 35762, 2007 WL 1461298, at *3 (emphasis in *Target*). The court adopts this portion of Judge Randa's analysis in full.[22] What happened in the case at bar is similar to what happened in *Target*. It is the opposite of what happened in *Delight Wholesale*, wherein the Eighth Circuit Court of Appeals pointed out that the "EEOC gave [the defendant] an opportunity to conciliate all three allegations [at issue in the lawsuit]. Thus, all three claims were properly before the district court." 973 F.2d at 669.

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[22] The court declines to follow *Target*'s additional statement that the "EEOC charge and the complaint must, at a minimum, describe the same conduct and implicate the same individuals." *Id.* at 2 (citation and internal quotation marks omitted). This statement is inconsistent with *Delight Wholesale*.

To rule to the contrary would severely undermine if not completely eviscerate Title VII's "integrated, multistep enforcement procedure," *Occidental Life*, 432 U.S. at 355, expand the power of the EEOC far beyond what Congress intended and greatly increase litigation costs. As counsel for CRST observed at the show cause hearing:

> Congress could not possibly have intended . . . to enfranchise [the EEOC] to use what amounts to weapons rather than a genuine process . . . . [T]here's a process that's in place according to statute. There can't possibly be empty formalism.
>
> Congress could not possibly have intended that simply by naming one person, you can then thereafter file a lawsuit and then figure out where you're going to go from there and impose this incredible expense that's been imposed on us, on defense, just to get to the point where [we know how many allegedly aggrieved persons on whose behalf the EEOC seeks relief].

Transcript (docket no. 254), at 9. To accept the EEOC's view of its own authority would also impose an untenable burden upon the federal district courts, as the EEOC might avoid administrative proceedings for the vast majority of allegedly aggrieved persons.

> [Yet] Congress could not possibly have intended that our federal district courts be burdened with the task of conducting mass trials of Title VII sexual harassment claims before a single jury absent some specifically charged unlawful

> practice commonly affecting all such claims, particularly when few of the claims were identified during the administrative process which Congress intended to act as a filter before any claims reached a federal court. Instead, [the] EEOC should be required to satisfy the conditions precedent of charging, investigating, finding reasonable cause, and conciliating each such unrelated claims before filing suit.

Brief in Support of Motion (docket no. 222-2), at 13.[23]

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[23] The observations of one commentator proved prophetic in the case at bar. The commentator wrote:

> By allowing claims not investigated in good faith to proceed to trial, mildly unfavorable employment decisions may become the subject of formal EEOC charges. . . . This may realistically equate to more frivolous suits reaching the courts. . . . Permitting the [EEOC] to circumvent its requirements can only broaden the number and scope of issues litigated, which, in turn, increases the time and expense of discovery and trials. Ultimately, when the EEOC only does enough to satisfy the "conciliation checkbox," the opportunity for mediation, arbitration or settlement and the quality of judicial decisionmaking is potentially diminished because more cases will require formal adjudication.
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> * * *
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> Title VII is a remedial statute created to 'further promote equal employment opportunities for American workers, and, as such, it is construed in favor of the complainant. Congress recognized that the judicial system is not always the most efficient or best medium for resolving employment disputes; therefore, the [EEOC] should only take a matter to trial if conciliation 'proves to be impossible.' . . . Congress gave substantial weight to the

The EEOC stresses that CRST knew or should have known many other women were complaining of sexual harassment and would continue to complain of sexual harassment after the EEOC filed this lawsuit. Even the most recalcitrant employer who flouts Title VII's prohibitions against unlawful employment discrimination, however, is due the process that Title VII mandates. *Cf. EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974) ("We agree with the court below that the regulation affords even the most uncooperative and recalcitrant respondent 'the right to be told that it has one last chance to attempt conciliation.'"). Congress surely did not intend that employers, even ones whose workplaces might be rife with sexual harassment, face the moving target of allegedly aggrieved persons that CRST faced in both the administrative and legal phases of this dispute.

The EEOC's failure to investigate the claims of the 67 allegedly aggrieved persons deprived CRST of a meaningful opportunity to engage in conciliation and foreclosed any possibility that the parties might settle all or some of this dispute without the expense of a federal lawsuit. The EEOC's insistence that the 67 allegedly aggrieved persons for whom it now seeks relief are truly part of the "class" of persons it referenced in the Letter of Determination is not well taken. This argument does nothing more than trade on

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premise that the EEOC would have to investigate and seek voluntary compliance before developing a lawsuit.

Anthony P. Zana, *A Pragmatic Approach to EEOC Misconduct: Drawing a Line on Commission Bad Faith in Title VII Litigation*, 73 Miss. L. J. 289, 316-17, 320-21 (2003).

the inherent ambiguity in the term "class" to the EEOC's own advantage. *Cf. Outback Steakhouse*, 520 F. Supp. 2d at 1267 ("Defendants had every reason to believe that the 'class' the EEOC was referring to in its determination was a *regional* class."); *Jillian's*, 279 F. Supp. 2d at 982-983 (finding the EEOC attempted to use the indeterminate term "class" in a letter of determination to impermissibly expand a regional administrative investigation into a nationwide lawsuit). Even if the court assumes that the EEOC need not identify each and every allegedly aggrieved person before filing a lawsuit, the EEOC's vague reference to a "class" in the Letter of Determination may only be understood in the context of the scope of the investigation that the EEOC actually conducted. The EEOC certainly may not simply issue a vague letter of determination as a predicate to meaningful conciliation. "It is, after all, *the EEOC's duty* to put Defendants on notice of the scope of the charges against them in order to give every incentive and allowance for settlement of the claims prior to filing the suit in court." *Outback*, 520 F. Supp. 2d at 1267 (emphasis in original); *see also Asplundh*, 340 F.3d at 1260 ("[A]t a minimum, [the EEOC must] make clear to the employer the basis for the EEOC's charges against it. Otherwise, it cannot be said that the [EEOC] has provided a meaningful conciliation opportunity." (Citation omitted.)). Here, Attorney Wolle unsuccessfully implored the EEOC to give CRST more information about the size of the "class."

In sum, the court is unpersuaded that CRST knew or should have known during the administrative phase of this dispute that it would need to defend against the allegations of the 67 allegedly aggrieved persons in the instant lawsuit. *Cf. Jillian's*, 279 F. Supp. 2d at 982 ("We are unpersuaded by the EEOC's evidence that [the defendant] knew or should have known that it was subject to a nationwide class action, since virtually all of that evidence is the product of discovery that occurred after it closed its investigation and filed its lawsuit."). *Id.* Because the EEOC did not investigate, issue a reasonable cause determination or conciliate the claims of the 67 allegedly aggrieved persons, the court shall bar the EEOC from seeking relief on their behalf at trial and dismiss the EEOC's Complaint. *See, e.g., Pierce Packing*, 669 F.2d at 608 ("Genuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit by the EEOC[.]"); *EEOC v. Am Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981) (same); *Outback*, 520 F. Supp. 2d at 1268 n.1 ("The EEOC does not contest that proper notice to a defendant-employer of the charges against it is a jurisdictional prerequisite to the EEOC filing suit against that employer."). *cf. Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 524-25 (5th Cir. 1980) (discussing the EEOC's "condition precedents" to suit).[24]

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[24] Had the EEOC not wholly abdicated its role in the administrative process, the court might have stayed the instant action for further conciliation in lieu of dismissal. *Compare EEOC v. Golden Lender Fin. Group*, 2000 U.S. Dist. LEXIS 4750, 2000 WL 381426, *5-*6 (S.D.N.Y. Apr. 13, 2000) (staying case because

Here, dismissal is a severe but appropriate remedy. Although dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom, to rule to the contrary would work a greater evil insofar as it would permit the EEOC to perfect an end-run around Title VII's "integrated, multistep enforcement procedure." *Occidental Life*, 432 U.S. at 355. It would ratify a "sue first, ask questions later" litigation strategy on the part of the EEOC, which would be anathema to Congressional intent.[25]

"it cannot be said that the EEOC has made absolutely no efforts to conciliate"), *with EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1256 (M.D. Ala. 1989) ("[T]he weight of the authority seems to be that the total failure to conciliate is a bar to suit by the EEOC.").

[25] The court expresses no view as to whether the trial attorneys for the EEOC acted in bad faith. The court notes that, upon filing the Complaint, the EEOC's higher-level attorneys issued a press release entitled "**TRUCKING GIANT CRST SUED FOR SEXUAL HARASSMENT OF FEMALE 'TEAM' DRIVERS.**" Mr. John Hendrickson, Regional Attorney for the Chicago District, and Mr. John P. Rowe, District Director of the Chicago District Office, commented on CRST's alleged practices. Def.'s Ex. 5 (docket no. 222-7), at 2 (emphasis in original). For example, Mr. Hendrickson stated: "This situation is chilling to contemplate: being trained by a sexual harasser on the open road in a sleeper cab, and not getting immediate help when you complain. We think the repetitive nature of the situation as alleged here makes this case especially compelling . . . ." *Id.* at 3. Mr. Hendrickson also attended an employment law conference in Chicago on October 1, 2008, in which he "highlighted the rampant sexual harassment exhibited by trucking giant CRST and their weak, if typical, defense that it was 'all the woman's fault.'" Def.'s Ex. 3 (docket 243-3), at 1. In *Asplundh*, the Eleventh Circuit Court of Appeals affirmed the dismissal of an EEOC enforcement action and an award of attorneys' fees against the *EEOC*. 340 F.3d at

The court cannot ignore the law as it is written by Congress and construed by the Eighth Circuit Court of Appeals in *Delight Wholesale.*

The government, like its citizens, must follow the law. The EEOC must respect Title VII's administrative scheme and follow the "clearly delineated paths to justice" that Congress has created. *Cf. Langbord v. U.S. Dep't of Treasury*, 645 F. Supp. 2d 381, 2009 U.S. Dist. LEXIS 66299, 2009 WL 2342638, *15 (E.D. Pa. 2009). "Seeking shortcuts to these paths does nothing more than undermine their valuable function and erode the meaning of the rights they are designed to protect." *Id.* "It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S. Ct. 289, 7 L. Ed. 2d 240 (1961) (Black, J., dissenting) (quoted in *Langbord*, 2009 U.S. Dist. LEXIS 66299, 2009 WL 2342638, at *15).

V. CONCLUSION

IT IS THEREFORE ORDERED:

(1) The court **BARS** the EEOC from seeking relief at trial in this case on behalf of Kierston Alleva, Tracy Ball, Stacy Barager, Pamela Barlow, Belinda Bedford, Mary Bender, Lillie Bingaman, Peggy Blake, Amber Blauvelt, Adda Brown-Lenzer, Deborah Carey, Kelli

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1261. The Eleventh Circuit Court of Appeals opined that the EEOC may have avoided conciliation to make headlines and press its case against the employer in the media. *Id.*

Carney, Diana Chester, Margaret Daniels, Darleaner Deese, Donna Dickson, Barbara Dixon, Nicole Edwards, Cynthia Fisk, Robryna Fitch, Yvonne Fortner, Marie Foster, Barbara Grant, Zelestine Grant, Martha Griffin, Sherri Halley, Wanda Hasbell, Catherine Heckman, Victoria High, Carolyn Hunsucker, Lola Hutton, Sheila Jackson, Tequila Jackson, Diona Johnson, Angela Lesmeister, Tessa Medley, Patricia Merritt, Cindy Moffett, Valerie Montoya, Debra Moorer, Veronica Mora, Julie Noernberg, Bobbi O'Dell, Anya Owens, Kathleen Peterson, Carole Petitt, Margaret Rice, Shalitha Ross, Denise Roundtree, Mechelle Schuder, Jammie Scott, Cathy Shaw, Annette Smith, Gloria South, Latesha Thomas, Doris Tiberio, Joyce Toppin, Tracye Taylor, Tracy Tuttle, Ramona Villarreal, Rebecca Waisr, Barbara Wallace, Tiani Warden Thompson, Kimberly Watson, Rhonda Wellman, Tameisha Wilson and Pamela Wright-Hoffman.

(2) The EEOC's Complaint (docket no. 8) is **DISMISSED.**

(3) The EEOC shall pay CRST's ordinary costs.

(4) CRST may file its request for costs **10 court days** after the disposition of the entire case.

(5) Now that CRST is a "prevailing party" as to the EEOC, 42 U.S.C. § 2000e-5(k), CRST may file an application for attorneys' fees from the EEOC within **20 court days** after disposition of the entire case.

(6) Formal judgment shall not enter against the EEOC and in favor of CRST until the court enters

judgment on the pending claims of the remaining Plaintiffs-Interveners.

IT IS SO ORDERED.

DATED this 13th day of August, 2009.

/s/ Linda R. Reade

LINDA R. READE

CHIEF JUDGE, U.S. DISTRICT COURT

NORTHERN DISTRICT OF IOWA

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 13-3159

Equal Employment Opportunity Commission

Appellant

v.

CRST Van Expedited, Inc.

Appellee

Appeal from U.S. District Court for the
Northern District of Iowa – Cedar Rapids
(1:07-cv-00095-LRR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 20, 2015

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans